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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 172.

JOHN STRICKLEY AND ELLEN STRICKLEY, PLAINTIFFS IN ERROR,

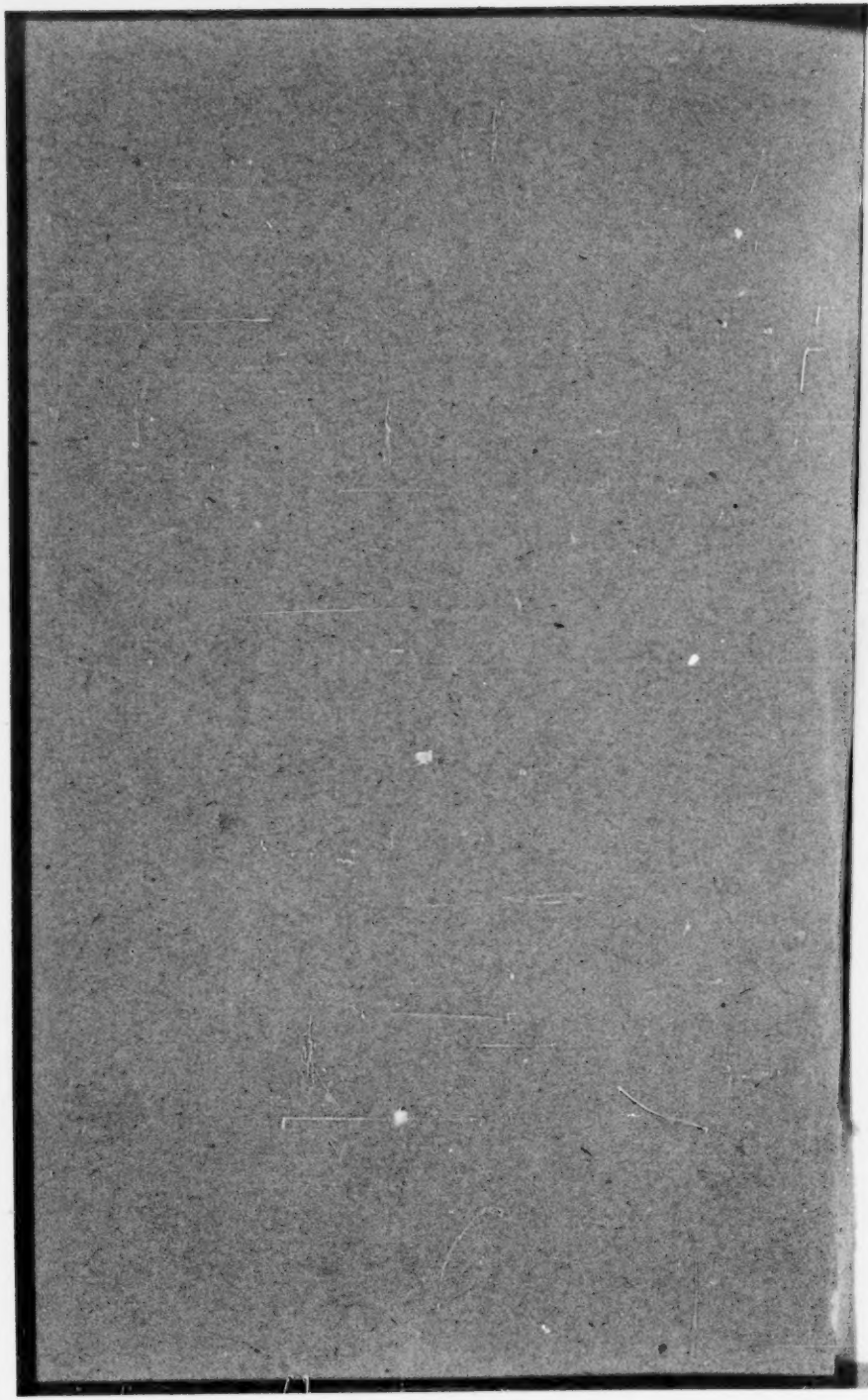
vs.

THE HIGHLAND BOY GOLD MINING COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF UTAH.

FILED JANUARY 30, 1905.

(19,620.)



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a-1 In the Third Judicial District Court of Utah, Salt Lake County.

HIGHLAND BOY GOLD MINING COMPANY, Plaintiff,
v.
JOHN STRICKLEY and ELLEN STRICKLEY, Defendants.

Complaint.

Comes now the said plaintiff and complains of said defendants and alleges:

1. That the said plaintiff is a mining corporation, organized under the name aforesaid on or about the 20th day of October, 1896, under the laws of the State of New Jersey and now existing and doing business as such in the State of Utah at all the times herein referred to. That the said plaintiff, by its articles of incorporation, was organized and authorized, and still is authorized to acquire, construct, maintain and operate aërial tramways for the transportation of ores, materials and the things generally used in and about the operation of mines, and amongst other things the said plaintiff was and is authorized to acquire, construct, maintain and operate an aërial tramway from its mining properties, situate in West Mountain mining district, Salt Lake county, Utah, in an easterly direction down to the depot of the Rio Grande Western Railway Company, which is situated in Bingham canyon in said mining district,
2 and said plaintiff several years heretofore constructed such tramway from its said mines to the said depot, and heretofore has been and now is operating such aërial tramway for the uses and purposes aforesaid.

2. That the said defendants, John Strickley and Ellen Strickley are husband and wife, and owners and claimants of the property hereinafter described and which is sought to be condemned by the said plantiff as a right of way for the operation of its aërial tramway, and said defendants, so far as is known to the said plaintiff, are the only owners and claimants of the property herein sought to be condemned, or of any property herein described.

3. That the said plaintiff desires to operate said aërial tramway from its said mines situate near the head of Bingham canyon, in the western part of said mining district and situate in Salt Lake county, in a- easterly direction for a distance of about two and one-half miles, more or less, and ending at the said depot, and to that end the said plaintiff heretofore surveyed and definitely located and constructed said aërial tramway, and heretofore has been using and now is using the same for the transportation of its ores, materials, and everything used in and about the operation of a mine. That the property hereby sought to be condemned and to be taken possession of by said plaintiff, is crossed by said aërial tramway, and

such property is necessary to the use of the said plaintiff as a right of way for the operation of such aërial tramway, which property has not heretofore been appropriated to any public use.

4. That the said plaintiff has made a map of such surveyed and located line, of the parcel of land hereby sought to be condemned, and the entire parcel of land of which said right of way is a part, but only so far as the same are involved in this action, which
3 map is hereto annexed, marked "A" and hereby made a part hereof. That the said right of way and premises sought to be condemned herein as aforesaid, are situate in West Mountain mining district, Salt Lake county, Utah, and described as, beginning at a point S. 27 deg. 22 min. W. 670.1 feet from corner No. 1, lot No. 302, Argonaut No. 1 placer mining claim, and running thence parallel with the center line of the Highland Boy Gold Mining Company's aërial tramway S. 30 deg. 05 min. W. 958.3 feet to a point on line 7-6 lot No. 302, Argonaut No. 1 placer mining claim, S. 1 deg. 30 mn. W. 1160 feet from corner No. 7, thence S. 1 deg. 30 min. W. 523 feet along said line 7-6, lot No. 302, thence N. 30 deg. 05 min. E. 961.0 feet, thence north 49.9 feet to the place of beginning, containing an area of 0.551 acres.

And the above described premises are a part of an entire parcel situate in said Salt Lake county, which entire parcel is described as, beginning at post No. 1 of said Argonaut No. 1 placer mining claim, the same being post No. 4 of lot No. 242 of the McGuire placer claim, from which a maple tree three inches in diameter blazed and marked B. T. U. S. 302 bears south seventy-two degrees east thirty feet distant; U. S. mineral monument No. 2 bears north forty-two degrees and forty-eight minutes east two thousand three hundred and sixty-nine feet distant, and the quarter section corner between sections 23 and 26, in T. 3 S., R. 3 W., Salt Lake meridian, bears south 83 deg. 40 min. E. 1019.3 feet distant.

Thence, first course, along west boundary line of said lot No. 242, S. 11 deg. 45 min. W. 115 feet to a point on boundary line between said sections 23 and 26, from which the said quarter section corner bears east 1036.3 feet distant, 336.7 feet to a pine post four inches square, marked U. S. 302 No. 2, the same being post No. 3 of said lot No. 242.

Thence, second course, along west boundary line of said lot No. 242, S. 1 deg. E. 443 feet to a point on line between the N. W. ¼ of the N. E. ¼ of the N. W. ¼ and the S. W. ¼ of the N. E. ¼ of the N. W. ¼ of said section 26 from which the west side line of said sub-
4 divisions bears W. 243.3 feet distant, 587.77 feet to a pine post four inches square, marked U. S. 302 No. 3, the same being post No. 2 of said lot No. 242.

Thence, third course, along west boundary line of said lot No. 242 S. 13 deg. E. 461.5 feet to a pine post four inches square marked U. S. 302, No. 4, the same being post No. 1 of said lot No. 242.

Thence, fourth course, S. 8 deg. E. 66.25 feet to a point on line between the N. W. ¼ of *of* the S. E. ¼ of the N. W. ¼, and the S. W.

¼ of the N. E. ¼ of the N. W. ¼ of said sections 26, from which the west side line of said subdivisions bears W. 359 feet distant, 237.5 feet to north side of a stable; 296.5 feet to the S. E. corner of a shed attached to said stable, also a pine post four inches square, marked U. S. 302 W. P. 5, as witness for corner No. 5, 376 feet to corner No. 5 not established, from which the N. E. corner of "Griffin house" bears south 55 deg. E. 68.75 feet distant, and the center of a shaft bears N. 76 deg. W. 32.5 feet distant.

Thence, fifth course, S. 70 deg. 45 min. W. 97.5 feet edge of creek, also a pine post four inches square, marked U. S. 302 W. P. 5, for witness to said corner No. 5, 423 feet to foot of quartzite bluff 432 feet to a point on line between the N. W. ¼ of the S. E. ¼ of the N. W. ¼ and the S. W. ¼ of the N. W. ¼ of said section 26, from which the north side line of said subdivision bears N. 451.4 feet distant, 921 feet to center of wooden flume, 958 feet to a pine post four inches square marked U. S. 302 No. 6, from which a point of rock marked + B. O. U. S. 302 bears north 39 deg. 25 min. E. 48 feet distant.

Thence, sixth course N. 1 deg. 30 min. E. 360 feet, center of said flume, 617 feet to a point on line between S. W. ¼ of the N. W. ¼ and N. W. ¼ of the N. W. ¼ of said section 26 from which the east side line of said subdivisions bears E. 483 feet distant 940 feet to a point from which a shaft bears E. 100 feet distant, 970 feet center of said flume, 1020 feet to a point from which a shaft bears E. 170 feet distant, 1080 feet to a point from which the mouth of a tunnel bears east 275 feet distant, 1175 feet to a point from which a pen-
5 stock at end of flume bears E. 170 feet distant; 1235 feet to a point from which a shaft bears E. 105 feet distant; 1275 feet to a point from which a shaft bears E. 70 feet distant; 1285 feet to a point from which a shaft bears E. 18.5 feet distant; and a shaft bears W. 140 feet distant; 1791 feet to a post four inches square marked U. S. 302 No. 7, with a mound of stones, said post being at a foot of a quartzite cliff forty feet high, a point of which marked + B. O. U. S. 302 bears south 32 deg. W. five feet distant.

Thence, seventh course, N. 70 deg. 45 min. E. 478 feet to a point on boundary line between said sections 23 and 26, from which the said quarter section corner bears E. 1317 feet distant, 509 feet creek at foot of hill; 645 feet center of creek, 683 feet center of creek, 803 feet to post No. 1, the place of beginning. Expressly excepting and excluding from these presents all that portion of the ground hereinbefore described, embraced in the W. ½ of the E. ½ of the N. W. ¼ of said section 26, and described as follows: Beginning at post No. 4, of said lot No. 302, thence S. 8 deg. E. 376 feet, thence S. 70 deg. 45 min. W. 432 feet, thence N. 1771.4 feet, thence E. 280.7 feet, thence S. 11 deg. 45 min. W. 221.7 feet, thence S. 1 deg. E. 587.77 feet, thence S. 13 deg. E. 461.5 feet to the place of beginning, the granted premises in said lot No. 302 containing 19.50 acres of land, more or less.

And said right of way for the length and width herein described is necessary to said plaintiff for the operation of its said aërial tramway.

Wherefore the plaintiff prays:

That the said right of way may be condemned to its use for tramway purposes, and that the damages for the defendants may be ascertained and upon payment for the same into this court by the said plaintiff that it may have and own the right of way herein described; that in the meantime the said plaintiff may be permitted to occupy the said premises herein sought to be condemned 6–10 in the manner and under the conditions prescribed by law, and that the plaintiff may have such other and further relief as may be equitable in the premises.

BENNETT, H., S. & V. C.,
Attorneys for Plaintiff.

STATE OF UTAH, }
County of Salt Lake, } ss:

R. H. Channing, Jr., being first duly sworn deposes and says: That he is superintendent of the said plaintiff, and that the foregoing complaint is true of his own knowledge.

R. H. CHANNING, JR.

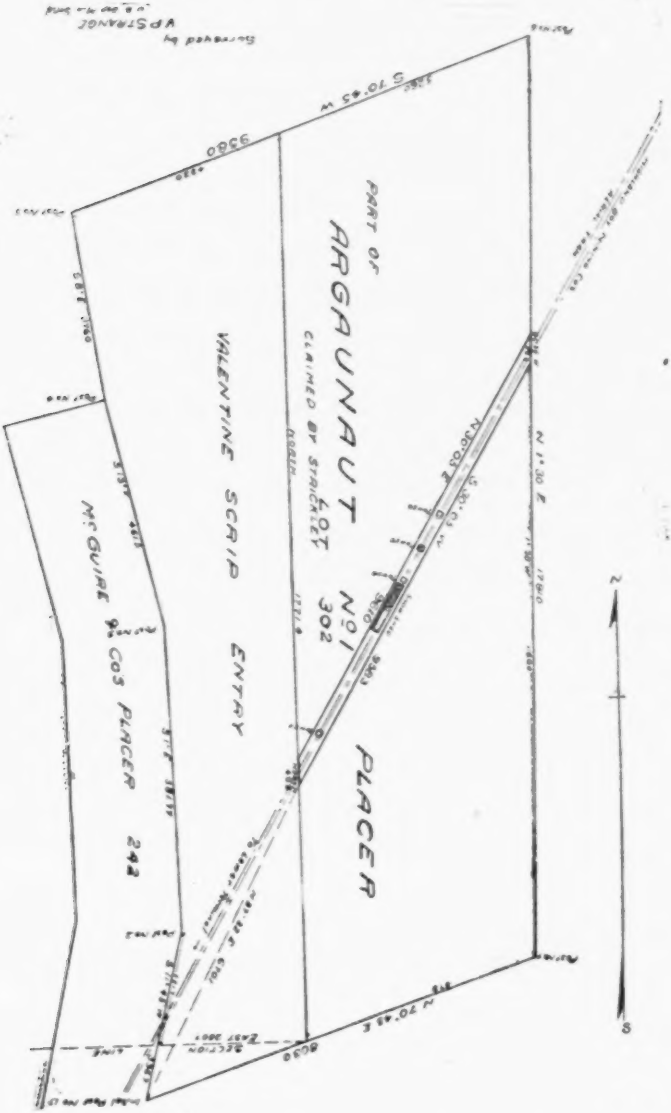
Subscribed and sworn to before me this August 2nd, 1901.

[SEAL.]

D. H. WELLS,
Notary Public.

Filed Aug. 2, 1901.

JOHN JAMES,
Clerk Dist. Court of Salt Lake County, Utah,
By JOSEPH MACKNIGHT,
Deputy Clerk.


PART OF
ARGAUNAUT
CLAIMED BY STRICKLEY
LOT No 302
PLACER
VALENTINE SCRIP ENTRY
McGUIRE & COS PLACER 242
3360
N 70° 45' E
N 1° 30' E
N
S

Trans., p. 8.

* * * * * * *

11 EXHIBIT "A."

In this action on the tenth day of July, 1901, a juridicial day of the May term, 1901, of said court, before the Honorable John A. Marshall, judge, said plaintiff appearing by Frank Hoffman, his attorney, and said defendant, appearing by A. Howat, its attorney, the demurrer of the plaintiff to the amended answer of the defendant having been overruled, a jury was duly empaneled and sworn, and thereupon certain testimony and evidence was given on the part of said plaintiff and defendant herein, and thereupon — motion of plaintiff the court instructed said jurors to return a verdict in favor of plaintiff for the possession of the property in controversy, and the court sustained said motion and so instructed said jurors,
12 and said jurors without leaving their seats returned the following verdict, to-wit: "We, the jury in the above entitled case, find the issues joined for the plaintiff, and that he is entitled to the possession of the premises in controversy as described in the complaint herein. Thomas C. Griggs, foreman."

Wherefore, by virtue of the law and by reason of the premises aforesaid, it is considered, ordered and adjudged by the court that the said plaintiff is entitled to and do have and recover of and from said defendant, The Highland Boy Gold Mining Company, that portion of the Argonaut No. 1 placer mining claim, situated in West Mountain mining district, Salt Lake county, State of Utah, described in the United States patent therefor, recorded in the office of the recorder of Salt Lake county, State of Utah, in Book U of Patents, pages 125 to 129 inclusive, as follows, to-wit: The portion of the ground over which said defendant has strung wire from station to station and the ground upon which said stations have been erected and is now occupied, by said stations and tramway, and it is further ordered and adjudged by the court that said plaintiff recover of and from said defendant, his costs by him in this behalf incurred taxed at the sum of $130.05 and let a writ of possession — execution issue therefor.

UNITED STATES OF AMERICA, } ss:
District of Utah, }

I, Jerrold R. Letcher, clerk of the circuit court of the United States for the district of Utah, do hereby certify that the above and foregoing is a true and correct copy of the entry in the judgment book of said court made on the tenth day of July, 1901, upon the verdict of the jury in said action, as fully and truly as the same appears of record in said judgment book and in the judgment roll in said action.

JERROLD LETCHER, Clerk,
[SEAL.] By JOHN W. CHRISTY, Deputy."

Filed Aug. 21, 1901.

JOHN JAMES,
Clerk Dist. Court of Salt Lake County, Utah,
By GEO. G. ARMSTRONG,
Deputy Clerk.

13 In the Third District Court, State of Utah, County of Salt Lake.

THE HIGHLAND BOY GOLD MINING COMPANY, Plaintiff,
v.
JOHN STRICKLEY and ELLEN STRICKLEY, Defendants.

Demurrer to Complaint.

Now comes the above named defendants and answering and demurring at the same time, for cause of demurrer, alleges:

First. That the court has no jurisdiction of the subject of the action.

Second. That the complaint does not state facts sufficient to constitute a cause of action.

Third. That the complaint — states facts sufficient to give the court jurisdiction of the premises or of the controversy of the action or of the subject matter sought to be litigated.

FRANK HOFFMAN,
Attorney for Defendants.

A copy of the within demurrer served on us this 21st day of August, 1901.

BENNETT, H. S. & V. C.,
Attorneys for Plaintiffs.

Filed Aug. 21, 1091.

JOHN JAMES,
Clerk Dist. Court of Salt Lake County, Utah,
By GEO. G. ARMSTRONG,
Deputy Clerk.

14 & 15 In the Third Judicial District Court of the State of Utah, Salt Lake County.

THE HIGHLAND BOY GOLD MINING COMPANY, Plaintiff,
v.
JOHN STRICKLEY and ELLEN STRICKLEY, Defendants.
Order to Occupy.

Whereas, the said plaintiff has moved said court for an order to permit it to occupy certain premises sought to be condemned pend-

ing the action, and to do such work thereon as may be required for the easement sought, and a description of which right of way is contained in the complaint on file herein, which is hereby referred to and hereby made a part hereof; and

Whereas, proof has been taken showing the value of said premises sought to be condemned, and of the damages which will accrue from the condemnation and of the reasons for requiring a speedy occupation, and,

Whereas, it appears according to the equity of the case and the relative damages which will accrue that said order should be granted;

Now, therefore, in consideration of the premises, the said plaintiff is hereby authorized and permitted to occupy the said premises sought to be condemned, and to do such work thereon as may be required for the easement sought, and the said plaintiff is ordered to give bond to the said defendants in the manner provided by law in the sum of two thousand dollars.

Done in open court this October 25, 1901.

C. W. MORSE, Judge.

Attest:
JOHN JAMES, Clerk,
By GEORGE C. ARMSTRONG,
Deputy Clerk.

16 & 17 In the Third District Court, State of Utah, County of Salt Lake.

THE HIGHLAND BOY GOLD MINING COMPANY, Plaintiff,
v.
JOHN STRICKLEY and ELLEN STRICKLEY, Defendants.

Now come the above named defendants and answering and demurring at the same time, for cause of demurrer allege:

First. That the court has no jurisdiction of the subject of the action.

Second. That the complaint does not state facts sufficient to constitute a cause of action.

Third. That the complaint does not state facts sufficient to give the court jurisdiction of the premises or of the controversy of this action or of the subject matter sought to be litigated.

FRANK HOFFMAN,
Attorney for Defendants.

18 In the Third District Court, State of Utah, County of Salt Lake.

HIGHLAND BOY GOLD MINING COMPANY, Plaintiff,
v.
JOHN STRICKLEY and ELLEN STRICKLEY, Defendants.

Amended Answer.

Now comes the above named defendants and by leave of the court first had and obtained, file this their amended answer to plaintiff's complaint herein, without waiving their demurrer heretofore entered.

The defendants deny generally each and every material allegation contained in plaintiff's complaint not herein specifically admitted or denied.

Denies that plaintiff either as a mining corporation or otherwise, by virtue of its articles of incorporation or otherwise, is or ever was authorized to use or operate or construct any aërial or other tramway either for the transportation of its ores or other materials or to operate any tramway either from its mining properties in West Mountain mining district or elsewhere, through or over the defendants' premises, as alleged in plaintiff's complaint.

Defendants further answering admit that for more than two years prior to the bringing of this action, the plaintiff had constructed and ever since has operated its said aërial tramway over and upon the premises described in plaintiff's complaint as the Argonaut No. 1 placer mining claim, the property of these defendants; but these defendants allege that the plaintiff's entry into and upon said Argonaut placer mining claim for the purposes of constructing said tramway and the operating thereof, and the appropriation of defendants' premises therefor, was and is unlawful and without right, and was and is a continuous trespass.

19 That they are the owners in fee and entitled to the possession of the Argonaut No. 1 placer mining claim with metes and bounds as described in plaintiff's complaint.

That the said claim is valuable for the gold contained in the gravel therein.

That in order to work the same to any advantage, the larger portion of the gold bearing gravel can only be worked by hydraulic process; the method commonly known among miners as "ground sluicing."

That in order to so work the claim it is necessary that the defendants have the sole and exclusive use and occupation of all the surface ground included within the boundaries of their claim.

That the tramway so erected and operated by the plaintiff is erected along the line near the center of the gravel channel of said claim throughout nearly the entire length of the claim.

Beginning at the extreme southwesterly portion of said claim extending northeasterly to the northeasterly corner thereof; that it is impossible to work by means of ground sluicing and to extract the gold therefrom while the plaintiff's towers and tramway remain on said ground and are operated as they are at the present time.

That to grant the easement prayed for in plaintiff's complaint and give it the perpetual right to use and operate said tramway and maintain its towers over that portion of the premises sought to be condemned, would render the working of defendants' mine impossible and destroy the value thereof.

That plaintiffs own and hold said Argonaut No. 1 placer mining claim by a patent from the Government of the United States which said patent conveys to them the exclusive right *of* all of the surface ground included within the boundaries of said mining claim and all minerals therein contained with the exclusive right to work and mine the same.

The plaintiff's claim of an easement and of the right to use and occupy said premises is unjust, contrary to law and without any right or equity whatever.

That defendant Strickley is the owner in fee of the Argonaut No. 1 placer mining claim.

That defendant Ellen Strickley is his wife, and the only interest of claim said Ellen Strickley has in said property is her dower right.

The defendants further allege that the construction and operation of said tramway is solely and exclusively for private use, to enable the plaintiff to transfer its ores from its mine to the depot in the West Mountain mining district a few cents a ton cheaper than it could be transported in any other way, which fact appears in plaintiff's complaint on file in this action and the plaintiff's pleadings in the case of John Strickley *vs.* The Highland Boy Gold Mining Company in the United States circuit court for the State of Utah, hereinafter referred to; and that the operation of said tramway and the use and occupancy of defendant's premises is solely for private use and not for public use.

That the taking of defendant's said ground by the plaintiffs and the use and occupation thereof for such private use and benefit is contrary to the provisions of the 14th amendment to the Constitution of the United States, and is unauthorized by law.

And for another and separate defense to the alleged cause of action stated in plaintiff's complaint and as a bar and estoppel to any judgment in favor of the plaintiffs herein, the defendant John Strickley alleges and shows to the court that heretofore on or about the first day of November, 1900, this defendant brought an action against the plaintiff in the third judicial district court in and for Salt Lake county, State of Utah, in which said action this defendant was the plaintiff and the plaintiff in this action, The Highland Boy Gold Mining Company, was the defendant. The said action was brought to recover the possession of the identical premises in dispute in this action.

21 That in said action the defendant here, the plaintiff in said former action, set up his ownership in and to the Argonaut No. 1 placer mining claim in West Mountain mining district, Salt Lake county, Utah, the same being the premises in controversy in this action, and prayed judgment for the possession of the same and particularly that portion occupied by plaintiff as an aërial tramway. The Highland Boy Gold Mining Company, the plaintiff in this action procured the case of Strickley, plaintiff, *vs.* The Highland Boy Gold Mining Company, to be transferred to the United States circuit court, in and for the district of Utah, and the case was so transferred and docketed in said court as No. 393.

In said court The Highland Boy Gold Mining Company, plaintiff in this action, filed its answer and amended answer.

In both the said answer and amended answer, the defendant in that court, the plaintiff in this court, by way of answer and counterclaim set up and alleged the same facts that are alleged in the complaint in this action and prayed for the same affirmative relief for which judgment is prayed for in this action, to-wit:

That the plaintiff in said action have judgment only for damages for the permanent use and occupation of the strip of land across said claim occupied by said tramway, with the right to operate the same and to enter upon the land occupied thereby and to make all necessary improvements and repairs to said tramway and the towers upon which it is supported, and defendant alleged in its counterclaim that the tramway so constructed by it over the premises, was with the intention to appropriate and acquire a permanent easement therefor.

The plaintiff in said action, one of the defendants here in this action, demurred to the said answer and counterclaim for the reason that the same did not state facts sufficient to constitute a defense to plaintiff's amended complaint, and in substance that the defendant had no right to maintain said action on its counterclaim. The defendant in that action, the plaintiff in this action, insisted on its right to maintain said counterclaim.

22-62 Plaintiff's demurrer was overruled and a trial was had upon the merits of the case on the issue made by the pleadings, and a judgment was rendered in said circuit court in favor of John Strickley, plaintiff in said action against The Highland Boy Gold Mining Company, the plaintiff in this action, for the possession of said premises, a copy of which said judgment is hereunto annexed marked Ex. "A," and made a part of this answer.

That defendant The Highland Boy Mining Company, prosecuted a writ of error from said judgment to the United States circuit court of appeals 8th circuit. That upon the trial of said action on appeal the judgment of the lower court was affirmed and judgment again rendered in favor of the defendant in this action and against the plaintiff, which said judgment is still in full force and effect and unsatisfied, and is a bar to any further proceedings in this action.

Wherefore defendant prays judgment that plaintiff's said cause

of action be dismissed and that plaintiff take nothing thereby; that defendant have judgment against the plaintiff for the possession of the premises in controversy herein and for such other and further relief as to the court may seem just and equitable and for their costs.

FRANK HOFFMAN,
Attorney for Defendants.

STATE OF UTAH, County of Salt Lake, } ss:

John Strickley being first duly sworn on his oath says: That he is one of the defendants in this action, that he has read the foregoing answer and knows the contents thereof and the same is true of his own knowledge.

JOHN STRICKLEY.

Subscribed and sworn to before me this 29th day of August, 1903.

FRANK HOFFMAN,
Notary Public.

[SEAL.]

Filed Aug. 29, 1903.

JOHN JAMES,
Clerk Dist. Court of Salt Lake County, Utah,
By GEO. G. ARMSTRONG,
Deputy Clerk.

* * * * * * *

63 Mr. HOFFMAN: I now offer in evidence plaintiff's answer in the case of Strickley *v.* Highland Boy Mining Company in the circuit court of the United States for the district of Utah.

Mr. VAN COTT: Is this the amended answer?

Mr. HOFFMAN: It is the answer to the amended complaint. This is the one that was served by your office. I am offering the allegations as to the uses that they intended to put this tramway to; the object in construing it and the reason for the condemnation for the right of way.

Mr. VAN COTT: Is that the only purpose for which it is offered?

Mr. HOFFMAN: That is one purpose.

Mr. VAN COTT: Is it the only purpose?

Mr. HOFFMAN: No, I am offering it as a record of the former court. This action was originally brought in this court and
64 transferred to the circuit court and that was a part of their pleadings and is a part of the record in that case. I simply want them introduced as the statement of the parties and as a record in this case.

Mr. VAN COTT: Is that the only purpose for which it is offered?

Mr. HOFFMAN: Now, yes; I may further on offer it for something else.

The COURT: It may be received.

Thereupon Mr. Hoffman read to the jury from Exhibit "C" as follows:

"That prior to the construction of said tramway and the alleged wrongs set forth in the complaint, the defendant was and still is a corporation organized under the laws of the State of New Jersey, and with franchises and powers to acquire, own, work, and operate mines, smelters and other reduction works, and to extract, transport to smelters and markets and reduce by smelting or otherwise, mineral ores, and to carry on a general mining and smelting business in the State of Utah and elsewhere, and in connection with said business to own and operate tramways to carry its ores from its mines to railroads for shipment to smelters or market.

That prior to the alleged wrongs it had established and has kept its principal office for the State of Utah, in Salt Lake City, Utah, and filed with the secretary of the State of Utah, and with the county clerk of Salt Lake county, Utah, a certified copy of its articles of agreement, certificate of incorporation and by-laws, and also by resolution of its board of directors accepted the provisions of
65 the constitution of the State of Utah, upon whom process issued by authority of, or under any law of the State of Utah may be served, and filed a certified copy of said resolutions in the office of the secretary of state of the State of Utah, and in the office of the clerk of Salt Lake county, in said State.

"That defendant had acquired and was working and still owns and is working a group of claims, situated in the West Mountain mining district, Salt Lake county, Utah, consisting of the Henry M. mining claim, U. S. lot 122, the Omaha mining claim, U. S. lot 141; the Highland Boy mining claim, U. S. lot 350, the Nina Fraction mining claim, U. S. lot 328; the Lorena mining claim, U. S. survey No. 3274; the Hillside mining claim, U. S. survey No. *3274; the Hillside mining claim U. S. survey No.* 3210, and a large number of other mining claims adjacent thereto and to each other, embracing in all 300 acres, more or less, of mining ground.

"That in working its mines it has employed over 100 men and expects to employ double that number in the future. That in connection with working its mines it has constructed and is operating a smelter in the Jordan valley about 18 miles distant from its mines, where it smelts its ores and has employed about 125 men, and will employ hereafter not less than 200 men; the amount of ore extracted from its mines and reduced at the smelter has been over 225 tons per day and will be increased to 450 tons per day.

"That its mines are situated on the westerly side of Bingham gulch, about 2 miles from, and at a considerable height above, the gulch; that the only railroad in the mining camp is in the gulch, and it is necessary for the defendant to get its ores down to the railroad for transportation to its smelter or any market.

66 That the ore produced from its mines is what is considered low grade, and to make its mine profitable, must be extracted

in large quantities and with economy in mining, transportation and reduction, and it is necessary to defendant to transport its ores from the mines to said railroad by power and more cheaply than by wagon haul.

That for such purpose the defendant constructed a wire rope overhead tramway on what is known as the Bleichert system, from its mines to said railroad, a distance of about two miles, which is operated by gravity and steam power at the mines, and consists of two cables about 8 feet apart, and with supporting towers resting on the ground, and said tramway was constructed and has ever since been operated over, and with towers on the Argonaut No. 1 placer mining claim, for a distance of 959.7 feet. That it is necessary for the practical operation of said tramway that it shall be, and it is on a straight line for its entire length, and any break or interruption of the line would destroy its whole value."

* * * * * * *

Mr. VAN COTT: The answer that has been read was amended and the amendments were allowed in the follo-ing particulars: I will read the part that is amended—I will read the title.

"In the Circuit Court of the United States, District of Utah.

JOHN STRICKLEY, Plaintiff,
v.
67-70 HIGHLAND BOY GOLD MINING CO., Defendant.

The defendant by leave of court first had and obtained, amends its answer to the amended complaint of the plaintiff here in the following particulars: By striking out the words "also by way of counterclaim" in the 6th line from the bottom of page 1 of said answer, and inserting in lieu thereof the words "and by way of equitable defense," so that the 5th and 6th line- from the bottom of page one of said answer shall read as follows: to-wit: "And for a further answer and by way of equitable defense, the defendant alleges."

Second. By inserting after the word "land" in the 9th line from the top of page 4 of said answer, the following words, to-wit: "And the defendant believed it to be unoccupied and unclaimed land."

Third. By striking out the prayer at the end of said answer, and inserting in lieu thereof the following—

"Wherefore, defendant prays that the plaintiff do not have judgment for the ejectment of defendant from that portion of said premises occupied by said tramway, but that it have judgment only for damages for the permanent use and occupation of the strip of land across said claim, or crossed by said tramway, with the right to operate the same and enter upon the land and occupy it thereby to make all necessary improvements and repairs to said tramway and the towers upon which it is supported." Then follow the sig-

natures of counsel for the Highland Boy Gold Mining Company and verification. And these amendments are made to the answer that had been introduced by the defendant, and at the places stated in the amendment.

* * * * * * *

71 Decision of the Court.

The COURT (after argument): Upon this preliminary question of the right to condemn, it is clearly established by the proof that has been offered that the use is a necessary use; and the question as to whether it would interfere with the proper operation of the placer claim belonging to the defendant (plaintiff), I think the evidence shows, if it were ever operated, and if it could be operated, it could be operated without interference from those towers, if the channel goes along the course as marked upon the map in red as gravel channel. And the evidence shows that the channel does go along that course, that is, whatever evidence there is upon that point is conclusive upon that question. But even though the gravel bed did not go along that course, and went from the Masters pit in a direct line to the Dixon pit under the liberal offer made by plaintiff in this case that they would adjust the towers so that the sand containing mineral, if there is any, beneath those towers, could be worked, I think does away with the theory or with the idea that it would interfere with the proper hydraulic process in the development of that mining claim.

Upon the question as to whether it is a public use or not the legislature having declared that tramways are public utilities, and the fact that in the same provision it shows that it is for the pur-

72 pose of developing mining enterprises and industries of the State, satisfies the court that the legislature intended these industries, to make them public utilities. So it makes the tramway that has been constructed in this a public utility, and any declaration that the plaintiff may have made in its pleadings, that it is for its private use, would not, and could not, deprive the public from using that tramway. Now if the owners of property adjoining the Highland Boy claims were to bring their ores where the ores are loaded upon those cars, such companies could insist upon the transportation of their ores from the point of reception there for the ores down to the point where the ores are unloaded. Of course, the legislature not having regulated the rates that such tramway can charge, that regulation would still be with the private corporation, and the mere fact that there are not, or may not be any properties that can utilize that tramway, does not deprive it of the nature of a public utility; and I am clearly of the opinion that it is a public utility, and this court feels that it should sustain the constitutionality of that statute.

There are two other questions raised, and they are, first, as to the wrongful occupation of the premises. I do not think that that

should deprive, under the authorities, the plaintiff of the right to condemn; and

Second. The question of *res judicata*. I think that has not yet been properly raised, or it does not apply in this case, because it does not appear from the record that the question of condemnation was ever settled, the right to condemn was ever adjudicated by any other court.

The court will allow the order for the condemnation to be made.

Mr. HOFFMAN: We take an exception.

Mr. VAN COTT: We have prepared findings and decree. I will give you a duplicate of it, Maj. Hoffman.

73 10 A. M., FRIDAY, Oct. 9, 1903.

Mr. HOFFMAN: In this case, I presume the order you made yesterday will be of record. But as I understand it, your honor did not yesterday pass upon the question as to the right of one owner of a mine to condemn another mine?

The COURT: Not in the way you put it; only as it is involved in this case.

Mr. HOFFMAN: I would ask a special ruling on that, if your honor would make it. Our objection is this, that the owner of one mining claim cannot condemn another mining claim for the convenient use and working of his own. That is, that it does not fall within the meaning of eminent domain.

The COURT: I take it then that you consider that the court did not pass upon all the questions as presented?

Mr. HOFFMAN: As I listened, I did not think that was passed upon.

The COURT: I would not like to pass upon an abstract proposition of that kind. I am willing to pass upon the questions as they were submitted to the court and raised in this case. I would not feel justified in passing upon an abstract proposition of that kind. I have passed upon the question so far as it has been raised in this case, and I am willing that the record should show that.

74 In the Third Judicial District Court of Utah, Salt Lake County.

HIGHLAND BOY GOLD MINING COMPANY, Plaintiff, *v.* JOHN STRICKLEY and ELLEN STRICKLEY, Defendants.	Findings of Fact, Conclusions of Law, and Interlocutory Decree.

This cause coming on duly and regularly to be heard October 8, 1903, Sutherland, Van Cott and Allison appearing as attorneys for the plaintiff, and Frank Hoffman appearing as attorney for the defendants, and testimony having been duly introduced and consid-

ered, and the court sitting without a jury for this preliminary hearing, it is now ordered, adjudged and decreed:

Findings of Fact.

1. That the said plaintiff is a mining corporation organized under the name aforesaid, on or about October 20 1896, under the laws of New Jersey, and now doing business in Utah, at all times herein referred to, and said plaintiff was organized and is authorized to acquire, construct, maintain, and operate an aërial tramway for the transportation of ores, materials, and the things generally used in and about the operation of mines, and said plaintiff, among other things, is authorized to acquire, construct, maintain and operate an aërial tramway from its mining properties situate in West Mountain mining district in Salt Lake county, Utah, in an easterly direction, down to the depot of the Rio Grande Western Railway Company, which is situated in Bingham canyon in said mining district, and said plaintiff, in 1898 and 1899, constructed such tramway from its said mines to the said depot, and heretofore has been and now
75 is operating such aërial tramway for the uses and purposes aforesaid.

2. That the mining properties owned by the said plaintiff are sitate quite high up in Bingham canyon, and at a considerable distance above the said railway depot, and the said tramway for all practical purposes answers the purpose of, and is used as a railway for the transportation of ore, coal, material and things generally used in and about mines and the operation of the same, and said tramway is used to facilitate the milling, smelting and reduction of ores and the working of mines, and plaintiff is a carrier for itself and others.

3. That the said plaintiff before constructing the said tramway over the premises hereinafter described made diligent inquiry to ascertain the owner of such mining claim, and although said mining claim was patented, yet the patent therefor had not been, and was not recorded in the recorder's office of Salt Lake county, Utah, until after the erection of said tramway, and the said defendant John Strickley, with knowledge, stood by, without objection or making his rights known while the said plaintiff erected and constructed such tramway over said mining claim.

4. That the said defendants John Strickley and Ellen Strickley are husband and wife, and owners and claimants of said mining claim and of the part that is sought to be condemned herein, and said defendants are the only persons and claimants of the property herein sought to be condemned, or of said mining claim.

5. That said plaintiff desires to operate said aërial tramway from its said mines near the head of Bingham canyon in the western part of said mining district, and situate in said county in an easterly direction for a distance of about two and one-half miles, and ending at said railway depot, and said plaintiff heretofore surveyed and

definitely located and constructed said aërial tramway and is
76 now using the same as aforesaid.

6. That the right of way required by said plaintiff across said mining claim is situate in West Mountain mining district, Salt Lake county, Utah, and described as beginning at a point S. 27deg. 22 *min.* W. 670.1 *feet from* corner No. 1, lot No. 302, Argonaut No. 1 placer mining claim, and running thence parallel with the center line of the Highland Boy Gold Mining Company's aërial tramway S. 30 deg. 05 min. W. 958.3 feet to a po[illegible] on line 7–6 lot No. 302 Argonaut No. 1 placer mining claim, S. 1 deg. 30 min. W. 1160 feet from corner No. 7, thence S. 1 deg. 30 min. W. 52.3 feet along said line 7–6, lot No. 302, thence N. 30 deg. 05 min. E. 961.0 feet, thence north 49.9 feet to the place of beginning, containing an area of 0.551 acres, and said right of way for the length and width herein described is necessary for the purposes hereinafter mentioned to said plaintiff for the operation of its said aërial tramway.

7. That the taking of said strip across the said claim is necessary to the said use of the said plaintiff, and is not appropriated to any other public use.

8. That the said plaintiff requires four towers on said right of way and claim for the operation of said tramway. Each of said towers is about of the size of seven and a half feet square and cables connect said four towers and other towers making a complete line as aforesaid; and the plaintiff only requires such use of the surface of said claim as will support the said four towers, together with said overhead cables and the right occasionally to drive along by the towers with team and wagon to make repairs, and said plaintiff agrees to move said four towers at any time to different points on said strip sought to be condemned, and at its expense when reasonable required by the owners of said mining claim for using the part of said claim not sought to be condemned, as well as the part sought
to be condemned, and such use of the surface by said plain-
77 tiff is entirely consistent with the use by said defendants of all of said claim except as aforesaid for the purpose of mining and working the same.

From the foregoing findings of fact the court now finds the following conclusions of law:

1. That the said plaintiff is entitled to condemn for public use, the premises heretofore described, and for the purposes heretofore specified, and such of said premises by said plaintiff is authorized by law and the taking is necessary to such public use.

2. That the said defendants are entitled to have their damages assessed as provided by law, and when so assessed and paid as provided by the law the said plaintiff is entitled to a "final order of condemnation."

Interlocutory Decree.

The court having made the foregoing findings of fact and conclusions of law, it is now ordered, adjudged, and decreed:

Subject hereafter to the assessment and payment of damages and the "*final order of condemnation*," *all as provided by law*, the right of way hereinbefore described is to be applied to a public use authorized by law and is hereby condemned for the public use and the taking to the extent hereinafter specified is necessary to such use, and in particular the purpose of such condemnation is to award the plaintiff a right of way as hereinbefore described for the erection of certain towers which may be connected by cables for the operation and maintenance of a tramway line, and the said plaintiff is only given such use of the surface, or surface left after removal, of such right of way for the purposes aforesaid, and to drive along such right of way when necessary for the purpose of making repairs, and said plaintiff is to move said towers to or rebuild the same on at any time, different points on said strip hereby condemned, and as often as requested
78 and at plaintiff's expense when reasonably required by the owners of said mining claim for using the part of said claim not sought to be condemned, as well as the part sought to — condemned, and such use of the said part of said surface by said plaintiff is entirely consistent with the use by said defendants of all of said claim except as aforesaid, for the purpose of mining and working the same, and removing the surface again and again, and the said defendants, or the owners of said claim, as the case may be, may work said claim as they see fit and proper, or otherwise use the same and whenever the right herein given to said plaintiff interferes with such use the said plaintiff is subject to remove said towers as aforesaid for the purpose of allowing the owners of such claim full use and enjoyment thereof except as aforesaid. The said plaintiff is not to erect over four towers on such right of way unless it should be reasonably necessary to have more in case the defendants or owners of said claim should request any of said present towers to be removed as aforesaid, but even in such event the said plaintiff is not to erect more towers than are reasonably required under the circumstances.

Done in open court October 9th, 1903.

SAMUEL W. STEWART, Judge.

[SEAL.]

Attest:
JOHN JAMES, Clerk,
By ELLA E. COTTLE,
Deputy Clerk.

Filed Oct. 9, 1903.
JOHN JAMES, Clerk,
By ELLA E. COTTLE, Deputy.

79 In the Third Judicial District Court of Utah, Salt Lake County.

HIGHLAND BOY GOLD MINING COMPANY, Plaintiff,
v.
JOHN STRICKLEY and ELLEN STRICKLEY, Defendants.
} Final Order of Condemnation.

This cause came on duly and regularly to be heard October 9th, 1903, before the court and a jury, for the purpose of assessing damages herein, and a verdict having been returned and judgment entered, the court now finds the following facts:

Findings of Fact.

1. The court heretofore made findings of fact, conclusions of law and interlocutory decree, in substance finding and adjudging that the said plaintiff could condemn the right of way hereinafter described, and for the purpose specified, over a certain mining claim hereinafter referred to, which is owned by the said defendants, which findings of fact, conclusions of law and interlocutory decree are on file in this court, and the same are hereby referred to and hereby made a part hereof.

2. That the jury impaneled in this case to assess damages, returned a verdict in favor of the defendants and against the plaintiff, finding the value of the said right of way to be the sum of $100, and interest amounting to the sum of $17.60, and found no
80 damages to the remaining part of the claim, and the total amount of the verdict was $117.60.

3. The costs herein are awarded as follows: The plaintiff is allowed no costs. The defendants' costs are taxed at $90.90, and the judgment and interest and costs have been paid in full into this court.

Now, therefore, in consideration of the premises, it is hereby ordered, adjudged, and decreed:

That those certain premises situate in West Mountain mining district, Salt Lake county, Utah, described as beginning at a point south 27 degrees 22 minutes west 670.1 feet from corner No. 1, lot No. 302, Argonaut No. 1 placer mining claim, and running thence parallel with the center line of the Highland Boy Gold Mining Company's aërial tramway south 30 degrees 05 minutes west 958.3 feet to a point on line 7–6 lot No. 302 Argonaut No. 1 placer mining claim, south 1 degree 30 minutes west 1160 feet from corner No. 7, thence south 1 degree, 30 minutes west 52.3 feet along said line 7–6 lot No. 302, thence north 30 degrees 05 minutes east 961.0 feet, thence north 49.9 feet to the place of beginning, containing an area of 0.551

acres, is hereby condemned for the occupation and use of the said plaintiff for the purpose of operating and maintaining an aërial bucket tramway along, over and upon the same, and in the particular manner, to-wit:

The said right of way is to be applied to a public use authorized by law, and the taking of such right of way to the extent herein specified, is necessary to such use, and in particular such right of way is to be used for the erection of certain towers which may be connected by cables for the operation and maintenance of a tramway line, and the said plaintiff is not only given such use of the surface, or surface left after removal of such right of way for the purposes aforesaid and to drive along such right of way when necessary for the purpose — making repairs, and said plaintiff
81 is to move said towers to, or to rebuild the same on, at any time, different points on said strip hereby condemned, and as often as requested, and at plaintiff's expense when reasonably required by the owners of said mining claim for using the part of said claim not sought to be condemned as well as the part sought to be condemned, and such use of the said part of said surface by said plaintiff is entirely consistent with the use by said defendants of all of said claim except as aforesaid, for the purpose of mining and working the same, and removing the surface again and again, and the said defendants, or the owners of said claim, as the case may be, may work said claim as they see fit and proper, or otherwise use the same, and whenever the right herein given to said plaintiff interferes with such use the said plaintiff is subject to remove said towers as aforesaid for the purpose of allowing the owners of such claim full use and enjoyment thereof except as aforesaid. The said plaintiff is not to erect over four towers on such right of way unless it should be reasonably necessary to have more in case the defendants or owners of such claim should request any of said present towers to be removed as aforesaid, but even in such event the said plaintiff is not to erect more towers than are reasonably required under the circumstances. The title to the above described right of way and for the purposes specified and mentioned, is hereby transferred and conveyed to the said plaintiff, its successors and assigns forever, and the said plaintiff is hereby directed to record a copy of this final order of condemnation in the office of the county recorder of Salt Lake county, Utah.

Done in open court this Nov. 10, 1903.

SAMUEL W. STEWART, Judge.

Attest:
[SEAL.]

JOHN JAMES, Clerk,
By ELLA E. COTTLE,
Deputy Clerk.

Filed Nov. 11, 1903.

JOHN JAMES, Clerk,
By ELLA E. COTTLE, Deputy.

82 In the Supreme Court of the State of Utah, Regular May Term, May 12, 1904.

HIGHLAND BOY GOLD MINING COMPANY, Respondent,
v.
JOHN STRICKLEY ET AL., Appellants. } Submission.

This cause coming on regularly to be heard was argued by Mr. Frank Hoffman in behalf of appellants, by Mr. Waldemar Van Cott in reply was submitted, and by the court taken under advisement.

Regular October Term, October 26, 1904.

Title of Court and Cause.

Judgment.

This cause having been heretofore argued and submitted, and the court being sufficiently advised thereon, it is now here considered, ordered, and adjudged, that the judgment of the court below be, and the same is hereby affirmed, with costs.

83 In the Supreme Court of the State of Utah.

HIGHLAND BOY GOLD MINING COMPANY, Respondent,
v.
JOHN STRICKLEY ET AL., Appellants.

Plaintiff brought this action to condemn a right of way for its aërial tramway over defendants' mining claim. The record discloses the following facts, viz: That plaintiff is a mining corporation and authorized to acquire, maintain and operate aërial tramways for the transportation of ores and other materials. Its mines are situated about two miles from the upper portion of Bingham, and in altitude about twenty-seven hundred feet above the valley. The tramway which consists of two cables supported on wooden towers extends from the mines to Bingham. The towers in some places are one thousand feet apart, and in others are close together, the space depending upon the contour of the ground. In case of gullies they are far apart; in going over ridges they are close together. The buckets run on wheels on the cables, and are moved by a single endless cable to which they are attached. Loaded buckets are carried down and the empty buckets brought up. Each bucket holds about seven hundred pounds of ore, and in them there is carried over five hundred tons of ore per day

every day of the year. This has been continued since
84 the spring of 1899. The plaintiff has in sight ore sufficient to last for about seven years, and reasonably expects, in the meantime, to develop ore for four or five years longer. All this ore is to be taken from the mines to Bingham, then loaded into railroad cars and shipped to plaintiff's smelter in Salt Lake valley. There is also taken over the tramway from Bingham up to the mines about five tons of coal a day; also supplies used in the operation of the mines are taken up the same way. The placer claim over which the right of way is sought to be condemned is on a hillside the surface of which is rough and irregular, and four towers are sufficient to cross the claim. A width of twenty-five feet is required for the towers and for a team to pass over the ground when necessary for the purpose of making repairs thereon. About two hundred men are employed at plaintiff's mines and about two hundred at its smelter which reduces only the ores from plaintiff's mines. A jury was empanelled and assessed the damages caused by the erection and operation of the tramway, and the court entered its findings and decree condemning a right of way for the occupation, maintenance and use of plaintiff for its tramway. The decree, among other things, provides that "said plaintiff is to move said towers to, or rebuild the same on, at any time, different points on said strip hereby condemned, and as often as requested, and at plaintiff's expense, when reasonably required by the owners of said mining claim for using the part of said claim not sought to be condemned, as well as the part sought to be condemned, and such use of the said part of said surface by said plaintiff is entirely consistent with the use by said defendants of all of said claim except as aforesaid, for the purpose of mining and working the same, and removing the surface again and again, and the said defendants, or the owners of said claim, as the case may be, may work said claim
85 as they see fit and proper, or otherwise use the same, and whenever the rights herein given to said plaintiff interferes with such use the said plaintiff is subject to remove said towers as aforesaid for the purpose of allowing the owners of such claim full use and enjoyment thereof except as aforesaid."

From that part of the judgment which decrees plaintiff a right of way over defendants' mining claim, defendants have appealed to this court.

McCarty, J., after stating the facts, delivered the opinion of the court.

Plaintiff bases its right to condemn on sec. 3588 Rev. Stat. 1898, as amended in 1901, Sess. Laws, p. 19, which provides that "The right of eminent domain may be exercised in behalf of the following public uses: (6) roads, railroads, tramways, tunnels, ditches, flumes, pipes and dumping places to facilitate the milling, smelting or other reduction of ores or the working of mines * * * ."

Appellants (defendants below) contend that the foregoing provision of the statute is in conflict with sec. 22, art. 1, const., Utah, which provides that "private property shall not be taken or damaged for public use without just compensation," for the reason that the use made of the right of way sought to be condemned is not a public use.

There appears to be an irreconcilable conflict in the authorities as to what constitutes a public use. This, no doubt, is largely due to the fact that in many cases what would be a public use in one jurisdiction would not be in another or different jurisdiction. Thus it has been almost uniformly held throughout the Pacific Coast States that the construction and operation of irrigation ditches is a public use, which doctrine, when applied to the arid region, has been approved by the Supreme Court of the United States,
86 whereas, in Ohio, New York, Pennsylvania, and other States where irrigation is not followed, and is practically unknown, it would undoubtedly be held not a public use. Therefore, what shall be considered a public use often depends somewhat upon the locality, the wants and necessities of the people, the conditions with which they are surrounded, and the nature and character of the natural resources of such locality, State, or Commonwealth. And while it is for the legislature to determine, in the first instance, whether the use is a public use, and to provide the means of condemnation, yet the great weight of authority holds that the declaration of the legislature is not final, and that it is ultimately for the courts to determine whether a particular use is public or not.

1 Lewis, Eminent Domain, (2nd ed.) 158.

The text writers on eminent domain, and the adjudicated cases practically all agree that when the legislature has declared a use to be public, such declaration will be respected and followed by the courts, unless the act is clearly and palpably unconstitutional, or the necessity for the taking is plainly without reasonable foundation.

2 Dillon, Mun. Corp. (4th ed.) 600.
U. S. *v.* Gettysburg Elec. Ry. Co. 160 U. S. 663.
Dayton Min. Co. *v.* Seawell, 11 Nev. 394.
Tuttle *v.* Moore, 64 S. W. 585.
Mills, Eminent Domain, (2nd ed.) 10.
Lewis, Eminent Domain, 158.
10 Am. & Eng. Ency. Law, (2nd ed.) 1070.

For a further discussion of the general and well established rule that legislative enactments are presumed to be constitutional unless the contrary clearly appears, see Fletcher *v.* Peck, 6 Cranch, 128; Munn *v.* Illinois, 94 U. S., 113; Stewart *v.* Board of Supervisors, etc., 30 Ia. 1; State *v.* Tingey, 24 Utah, 225, and cases cited; State *ex rel.* *v.* Lewis, 26 Utah 120.

The reason for the rule when applied to the law of eminent
87 domain is very apparent, as there are some uses for which private property may be condemned, the public character of which is so plain that there is no room for argument; and on the other hand there are innumerable uses for which property may be and is used, the private character of which is equally clear and plain. As stated by counsel for respondent, in their brief, "Between these two extremes, however, courts can approach a dividing line which is so shadowy that it leaves room for argument as to whether or not a statute is constitutional. A short distance on either side of the line the decision is plain, but on the line and for a short distance on each side it is doubtful." And as hereinbefore stated, whenever the court is in doubt, it holds the statute constitutional. Therefore, unless it clearly appears that the use made of the right of way, in question, is private and in no sense public, the validity of the statute must be upheld.

Some general rules by which the question as to what constitutes a public use may be determined, were declared by this court in the case of Nash *v.* Clark, 75 Pac. 371. In that case it was, in effect, held that when the taking is for a use that will promote the public interest, and which tends to develop the great natural resources of the State, such taking is for a public use.

The mining industry in this State is second in importance only to that of irrigation, and this court held in the case of Nash *v.* Clark, *supra*, that the construction and operation of irrigation ditches is a public use. Counsel for appellants, in his brief, concedes "that irrigation is a public use, and that the condemnation of lands for irrigation ditches is for a public use;" and again he says: "There is no person, I take it, of ordinary intelligence, that would assert or
88 think for a moment, that the system of irrigation as adopted and used throughout this whole western country is not surely a public benefit and a public use."

In Great Falls Mfg. Co. *v.* Fernald, 47 N. H. 444, the court, after speaking of the interests that New Hampshire had in the improvement and development of her natural water power, say: "No State of the Union is more interested than ours in the improvement of natural advantages for the application of water power to manufacturing purposes. Nature has denied to us the fertile soil and genial climate of other lands, but by way of compensation has endowed us with unrivalled opportunities of turning our streams of water to practical account. The present prosperity of the State is largely due to what has already been done towards developing these natural advantages; and there is no assignable limit to our resources in this respect if extended and connected enterprises for the improvement of the water power in the State should be successfully prosecuted hereafter. In no part of the world have the public a deeper interest in the success of all undertakings which promise to assist in the development of these great natural advantages. Whether, therefore, we look to the interpretation which has been given in other jurisdic-

tions to the term *public use*, in reference to the right of taking private property for such a use; to the legislative practice under the provincial and State governments before and at the time when the constitution was adopted; to the language of the constitution itself; to the early and continued legislative practice under the constitution; to the decisions of the courts in this State, or to the character of our business and the natural productions and resources of the State, we are drawn to the conclusion that the legislature have power to authorize a private right that stands in the way of an enterprise set on foot for the improvement of the water power in a large stream like this river, to be taken without the owner's consent, if
89 suitable provision is made for his compensation; and that the act of the legislature is constitutional and valid."

The same reasons that hold that manufacturing is necessary to the public welfare in New Hampshire, and other New England States, can be urged in behalf of mining in Utah and other Western States. The mining industry in this State, and in others similarly situated, not only produces a home market for the products of the farm and furnishes thousands of men with steady employment at liberal and remunerative wages, but also produces wealth which has enabled other industries to be created and to flourish which, without the stimulus this furnished would languish.

In Dayton Mining Co. *v.* Seawell, *supra*, Mr. Chief Justice Hawley, speaking for the court, aptly portrays some of the conditions and disadvantages under which the mining industry is prosecuted in this intermountain region as well as some of the benefits derived therefrom, as follows:

"The mining and milling interests give employment to many men, and the benefits derived from this business are distributed as much and sometimes more among the laboring classes than with the owners of the mines and mills. The mines are fixed by the laws of nature, and are often found in places almost inaccessible. For the purpose of successfully constructing and carrying on the business of mining, smelting, or other reduction of ores, it is necessary to erect hoisting works, to build mills, to construct sme-ting furnaces, to secure ample grounds for dumping waste, rock and earth; and a road to and from the mine is always indispensable. The sites necessary for these purposes are often confined to certain fixed localities."

We have in this State in addition to the extensive deposits of gold, silver, lead and copper ores, large areas of lands con-
90 taining coal in almost limitless quantities, and we depend almost exclusively upon the coal mines for the fuel used in our manufacturing establishments and for domestic purposes. Now it is of vital importance to the people that the coal, as well as the other hidden resources of the State, be opened up and developed, and that the mining industry in general, which has been the source of so much wealth to the people of this and other Western States be conducted on the same extensive scale in the future that has character-

ized its operations in the past. Therefore the public policy of the State, as exemplified by the act of the legislature under consideration, is to encourage the people to open up and exploit the mines with which the State abounds, and thereby not only give to the State the wealth which will enable other industries to be created, but furnish thousands of laborers with remunerative employment.

It being conceded, and this court having held, that the construction and operation of irrigating ditches in this State is a public use (Nash *v.* Clark, *supra*) it follows that the construction of roads and tramways for the development of the mining industry is a public use, as the same line of reasoning that applies in support of the doctrine in the one case holds good in the other. Otherwise, a party owning a few acres of farming land, or only a few square rods for that matter, could invoke the law of eminent domain, and by condemnation proceedings acquire a right of way across his neighbor's land for an irrigation ditch to convey water to his small holdings, whereas, the owners of mines and of works for the reduction of ores, the operations of which furnish thousands of men in this State with employment at good wages, and to which the general prosperity of the State is largely due, would be denied the right to invoke this same rule of law in order to acquire, when necessary to the successful operation of their business, rights of way for the transportation of ores from the mines to the mills and smelters, and for the construction of tunnels and drainage
91 and other purposes. And parties holding the title to ground necessary and suitable for these purposes which, in many cases, except for such purposes might be entirely worthless, would be clothed with power to demand and compel payment of an unconscionable price for their lands before parting with the title, or they could refuse, absolutely to grant the easement required, on any terms, and thereby, in some cases, cripple mining enterprises or destroy them altogether. Such a policy would not only be inconsistent and unreasonable, but would greatly retard the development of one of the greatest natural resources of the State. We are therefore of the opinion, and so hold, that the construction and operation of roads and tramways for the development and working of mines is a public use.

The act of the legislature, under consideration, makes ample provision for the payment of a fair price to the owner for lands sought to be condemned, and for all damages that he may suffer because of such taking, and is therefore valid.

There are several other questions of minor importance raised and discussed by appellants, in their brief, but as neither the abstract nor brief contain a specification of the points relied upon as grounds for a reversal, as required by rule 6 of this court, they can not be considered.

The judgment of the trial court is affirmed, with costs.

I concur:

BARTCH, J.

I concur in the affirmance of the judgment.

BASKIN, C. J.

92 In the Supreme Court of the United States.

JOHN STRICKLEY and ELLEN STRICKLEY, Plaintiffs in Error,
vs.
THE HIGHLAND BOY GOLD MINING COMPANY, a Corporation, Defendant in Error.

Come now John Strickley and Ellen Strickley plaintiffs in error herein, and respectfully show to the court that on the second day of August, 1901, defendant in error herein brought its action against the plaintiffs in error in the third judicial district court of the State of Utah, in and for Salt Lake county, under chapter 65 of the Revised Statutes of Utah of 1898, entitled "Eminent domain," as amended by the Laws of Utah of 1901 and 1903, pages 19 and 119 respectively, wherein they sought to condemn for the purposes and uses of an aërial tramway, owned and constructed by the defendant in error from its mines in West Mountain mining district, Salt Lake county, Utah, to the depot of the Rio Grande Western Railway Company, in said district and distant about two and one-half miles from its mines, said tramway having been constructed and operated for several years before the bringing of this action. The right of way sought to be condemned was on and diagonally across the Argonaut placer mining claim, the title to which was vested in these plaintiffs in error by virtue of a patent from the Government of the United States, being designated in said patent as the Argonaut No. 1 placer mining claim, lot 302. The uses and purposes for which said tramway was to be and is being used are set forth in plaintiff's complaint in said action as follows:

"That the said plaintiff desires to operate said aërial tramway "from its said mines situate near the head of Bingham canyon, in "the western part of said mining district and situate in Salt Lake
"county, in a- easterly direction for a distance of about two
93 "and one-half miles, more or less, and ending at the said
"depot, and to that end the said plaintiff heretofore surveyed "and definitely located and constructed said aërial tramway, and "heretofore has been using and now is using the same for the trans- "portation of its ores, materials and everything used in and about "the operation of a mine. That the property hereby sought to be "condemned and to be taken possession of by said plaintiff, is "crossed by said aërial tramway, and such property is necessary to "the use of the said plaintiff as a right of way for the operation of "said aërial tramway, which property has not heretofore been ap- "propriated to any public use."

That within due time the plaintiffs in error filed a demurrer and an answer to the complaint in the court in which said action was

pending and thereafter, after due notice had been given and with the consent of the respective parties, an amended demurrer and an amended answer were filed in which said amended answer the plaintiffs in error alleged that they owned and held "said Argonaut "No. 1 placer mining claim by a patent from the Government of "the United States which said patent conveys to them the exclusive "right to all the surface ground included within the boundaries of "said mining claim and all minerals therein contained with the "exclusive right to work and mine the same.

"The plaintiff's claim of an easement and of the right to use and "occupy said premises is unjust, contrary to law and without any "right or equity whatever."

And further, "that the construction and operation of said tram-"way is solely and exclusively for private use, to enable the plaintiff "to transfer its ores from its mine to the depot in the West Moun-"tain mining district a few cents a ton cheaper than it could be "transported in any other way, which fact appears in plaintiff's "complaint on file in this action and the plaintiff's pleadings in the "case of John Strickley *vs.* The Highland Boy Gold Mining Com-"pany in the United States circuit court for the State of Utah, here-"inafter referred to; and that the operation of said tramway and "the use and occupancy of said defendant's premises is solely for

"private use and not for public use.

94 "That the taking of defendant's said ground by the plain-

"tiffs and the use and occupation thereof for such private use "and benefit is contrary to the provisions of the 14th amendment to "the Constitution of the United States, and is unauthorized by law."

"A further issue raised by the plaintiffs in error in their plead-"ings was "that the tramway so erected and operated by the plain-"tiff is erected along the line near the center of the Gravel channel "of said claim nearly the entire length of the claim.

"Beginning at the extreme southwesterly portion of said claim "extending northeasterly to the northeasterly corner thereof; that "it is impossible to work by means of ground sluicing and to ex-"tract the gold therefrom while the plaintiff's towers and tramway "remain on said grounds and are operated as they are at the present "time.

"That to grant the easement prayed for in plaintiff's complaint "and to give it the perpetual right to use and operate said tramway "and maintain its towers over the portion of the premises sought to "be condemned, would render the working of defendant's mine im-"possible and destroy the value thereof.

"That plaintiffs own and hold said Argonaut No. 1 placer min-"ing claim by a patent from the Government of the United States, "which said patent conveys to them the exclusive right *of* all of the "surface ground included within the boundaries of said mining "claim and all minerals therein contained with the exclusive right "to work and mine the same.

"And plaintiff's claim of an easement and of the right to use and

" occupy said premises is unjust, contrary to law and without any " right or equity whatever."

The defendant in the court below and the plaintiffs in error herein, prayed judgment that the action brought in said court be dismissed. The case came on for hearing and the plaintiff's right to condemn was heard by the court and a jury, and on the 9th day of October, 1903, the court made its interlocutory decree, adjudging the right of the plaintiffs in said action and the defendants herein to condemn said premises and on the 10th day of November, 1903, filed its findings of fact, conclusions of law, judgment and
95 decree in favor of said defendant in error and decreeing as follows:—

" The title to the above described right of way and for the pur- " poses specified and mentioned, is hereby transferred and conveyed " to the said plaintiff, its successors and assigns forever, and the said " plaintiff is hereby directed to record a copy of this final order of " condemnation in the office of the county recorder of Salt Lake " county, Utah."

In the hearing had on the right to condemn, plaintiffs in error introduced a declaration of the defendant in error in the circuit court of the State of Utah, in an action between these same parties and on this same controversy, which is as follows:

"And for a further answer and also by way of counter claim, the " defendant alleges: 'That prior to the construction of said tram- " way and the alleged wrongs set forth in the complaint, the de- " fendant was and still is a corporation organized under the laws of " the State of New Jersey, and with franchises and powers to acquire, " own, work and operate mines, smelters and other reduction works, " and to extract, transport to smelters and markets, and reduce by " smelting or otherwise, mineral ores, and to carry on a general " mining business in the State of Utah and elsewhere, and in con- " nection with said business to own and operate tramways to carry " its ores from its mines to railroads for shipment to smelters or " market.

" That prior to the alleged wrongs it had established and has " kept its principal office for the State of Utah, in Salt Lake City, " Utah, and filed with the secretary of state of Utah, and with the " county clerk of Salt Lake county, Utah, a certified copy of its " articles of agreement, certificate of incorporation and by-laws and " also by resolution of its board of directors accepted the provisions " of the constitution of the State of Utah, and designated an agent " residing in the city and county of Salt Lake, Utah, upon whom " process issued by authority of or under any law of the State of " Utah may be served, and filed a certified copy of said resolutions " in the office of the secretary of the State of Utah, and in the office of " the clerk of Salt Lake county in said State.

" That defendant had acquired and was working and still owns " and is working, a group of claims situated in the West Mountain

"mining district, Salt Lake county, Utah, consisting of the
96 "Henry M. mining claim, U. S. lot No. 122; the Omaha
"mining claim, U. S. lot No. 141; the Highland Boy min-
"ing claim, U. S. lot No. 350; the Nina Fraction mining claim,
"U. S. lot No. 328; the Lorena mining claim, U. S. survey No.
"3274; the Hillside mining claim, U. S. survey No. 3274; the Hill-
"side mining claim, U. S. Survey No. 3210; and a large number of
"other mining claims adjacent thereto and to each other, embracing
"in all 300 acres, more or less, of mining ground.

"That in working its mines it has employed over 100 men and
"expects to employ double that number in the future. That in
"connection with working its mines it has constructed and is operat-
"ing a smelter in the Jordan valley about 18 miles distant from its
"mines, where it smelts its ores and had employed about 125 men,
"and will employ hereafter not less than 200 men; the amount of
"ore extracted from its mines and reduced at the smelter has been
"over 225 tons per day and will be increased to 450 tons per day.

"That its mines are situated on the westerly side of Bingham
"gulch, about two miles from and at a considerable height above
"the gulch. That the only railroad in the mining camp is in the
"gulch and it is necessary for the defendant to get its ores down to
"the railroad for transportation to its smelter or to any market.

"That the ore produced from its mines is what is considered low
"grade, and to make its mining profitable, must be extracted in large
"quantities and with economy in mining, transportation and re-
"duction, and it is necessary to defendant to transport its ores from
"the mines to said railroad by power and more cheaply than by
"wagon haul.

"That for such purpose the defendant constructed a wire rope,
"overhead tramway, on what is known as the Bleichert system,
"from its mines to said railroad, a distance of about two miles, which
"is operated by gravity and steam power at the mines, and consists
"of two cables about 8 feet apart, and with supporting towers resting
"on the ground, and said tramway was constructed and has ever since
"been operated over and with its towers on, the Argonaut No. 1
"placer mining claim, for a distance of 959.7 feet.

"That it is necessary for the practical operation of said tramway
"that it shall be, and it is on a straight line for its entire length
"and any break or interruption of the line would destroy its
97 "whole value.'"

It was from this judgment and order of condemnation that the defendants in the trial court and the plaintiffs in error herein, in due time, appealed to the supreme court of the State of Utah, it being the highest court and the court of last resort in the State. That on the 26th day of October, 1904, the said supreme court after having heard and duly considered the cause, rendered its decision affirming the judgment of the trial court and holding and declaring the right of the defendant in error to condemn the Argonaut placer

mining claim, the property of the plaintiffs in error, for the purposes alleged by defendant in error's complaint in the court below.

In this judgment of the supreme court of the State of Utah, these plaintiffs are by their counsel advised and verily believe and therefore state that error was committed to their great detriment and injury, which will more fully appear from the assignment of errors which is filed with this petition.

Wherefore your petitioners pray that a writ of error be issued in this behalf to the supreme court of the State of Utah for the correction of the errors so complained of, and that a transcript of the record, proceedings and papers in this cause duly authenticated may be sent to the Supreme Court of the United States.

Dated December —, 1904.

JOHN STRICKLEY &
ELLEN STRICKLEY,
Plaintiffs in Error,
By ARTHUR BROWN,
FRANK HOFFMAN,
Their Attorneys.

98 Assignment of Errors.

Now come John Strickley and Ellen Strickley, petitioners to the supreme court of the State of Utah, by Frank Hoffman, their attorney and say that the said supreme court of the State of Utah in rendering its decision and judgment in this cause, erred in the following particulars, to wit:

1st. That the use to which the defendant in error was seeking to condemn the property of the plaintiff in error was a public use as defined by the 14th amendment to the Constitution of the United States.

2nd. That the plaintiff in the trial court had the right to condemn another mining claim held under a patent from the Government of the United States for the sole and exclusive use of working its own adjacent mining claim.

3rd. That the supreme court of the State of Utah further erred in refusing to distinguish between the uses and purposes to which the defendant in error was seeking to condemn the plaintiff's property as contained in its own declaration and pleadings from the broad question whether or not the working and development of a mining claim is a public benefit and a public use, or in other words, whether or not the development of the mining resources of any State is a public or private enterprise.

4th. The court further erred in failing to determine the difference between the rights of one mine owner seeking to condemn the property of his neighbor, another mine owner, for the more convenient use and purpose of conducting the same business that his neighbor was conducting.

ARTHUR BROWN,
FRANK HOFFMAN,
Att'ys for Plaintiffs in Error.

99 UNITED STATES OF AMERICA, ss:

The President of the United States of America to the honorable the judges of the supreme court of the State of Utah, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment which is in the said supreme court of the State of Utah, before you or some of you, being the highest court of law in the said State in which a decision could be had in the said cause between The Highland Boy Gold Mining Company, a corporation, as plaintiff, and John Strickley and Ellen Strickley as defendants and wherein the said Highland Boy Gold Mining Company claimed the right to condemn the property in question, the same being a patented mining claim, said suit being brought under a statute of the State of Utah regulating the right of eminent domain. The defendants claiming that the said statute of the State of Utah was and is in violation of the 14th amendment to the Constitution of the United States, and the decision of the said supreme court was against the rights guaranteed by the said 14th amendment to the Constitution of the United States and against the defendants and in favor of the plaintiffs and was against the constitutional rights claimed by the said John Strickley and Ellen Strickley and a manifest error hath happened to the great damage of the said John Strickley and Ellen Strickley as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and a full and speedy justice done to the parties aforesaid in this behalf, do command you, if any judgment therein be given, that then, under your seal, distinctly and openly, you send the record and the proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ so that you have the same at Washington on the — day of February, 1905 in said Supreme Court then and there held, that, the record and the proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of
100 the said Supreme Court, the 16 day of December, 1904.

[Seal United States Circuit Court, District of Utah.]

JERROLD R. LETCHER,
Clerk of the United States Circuit Court, District of Utah.

Allowed by—
ROBERT N. BASKIN,
Chief Justice of the Supreme Court
of the State of Utah.

Service of a copy of the above petition for writ of error accepted on this 20th day of December, 1904 and after the same was allowed.

SUTHERLAND, VAN COTT & ALLISON,
Att'ys for Def't in Error.

[Endorsed:] 1540 Filed Dec. 19 1904 L. P. Palmer, clerk supreme court, Utah, by H. W. Griffith, deputy.

101 In the Supreme Court of the United States.

JOHN STRICKLEY and ELLEN STRICKLEY, Plaintiffs in Error,
vs.
THE HIGHLAND BOY GOLD MINING COMPANY, a Corporation, Defendant in Error.

THE UNITED STATES OF AMERICA, ss:

The President of the United States to the Highland Boy Gold Mining Company, a corporation, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, within sixty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Utah, at Salt Lake City, Utah, wherein John Strickley and others are plaintiffs in error, and The Highland Boy Gold Mining Company, a corporation, is defendant in error, to show cause, if any there be, why the said judgment rendered against the plaintiffs in error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Robert N. Baskin chief justice of the supreme court of the State of Utah, this 19th day of December, 1904.

[Seal Supreme Court, State of Utah, Jan. 4, 1896.]

ROBERT N. BASKIN,
Chief Justice of the Supreme Court of the State of Utah.

Filed on return Dec. 22, 1904.

L. P. PALMER,
Clerk Supreme Court, Utah,
By H. W. GRIFFITH,
Deputy Clerk.

[Endorsed:] 1540 Highland Boy Gold Mining Co. vs. John Strickley and Ellen Strickley, appellants. Citation.

JOHN STRICKLEY and ELLEN STRICKLEY, Plaintiffs in Error,
vs.
THE HIGHLAND BOY GOLD MINING COMPANY, a Corporation, Defendant in Error.

I hereby certify and return that I served the within citation on the therein named defendant, The Highland Boy Gold Mining Com-

pany, by handing to, and leaving with, R. H. Channing general manager and designated agent of said defendant company, a true copy thereof, in the city of Salt Lake, district of Utah, on the 19th day of December, 1904.

B. B. HEYWOOD,
United States Marshal,
By L. H. SMYTH,
Chief Deputy.

102 In the Supreme Court of the State of Utah.

JOHN STRICKLEY and ELLEN STRICKLEY, Plaintiffs in Error,
v.
THE HIGHLAND BOY GOLD MINING COMPANY, a Corporation, Defendant in Error.
} Undertaking on Writ of Error.

Know all men by these presents: that we, John Strickley and Ellen Strickley, as principals, and George Mullett and Fred A. Slade of Salt Lake City, Utah, as sureties, are held and firmly bound unto the defendant, The Highland Boy Gold Mining Company, a corporation, in the full and just sum of three hundred dollars ($300) to be paid to the said defendant, its successors and legal representatives, to which payment, well and truly to be made, we bind ourselves, our heirs and administrators, jointly and severally by these presents.

Sealed with our seals and dated this — day of December, in the year of our Lord one thousand nine hundred and four.

Whereas, lately pending in the supreme court of the State of Utah, in a suit pending between The Highland Boy Gold Mining Company, a corporation, as plaintiff, and John Strickley and Ellen Strickley, as defendants, judgment was rendered against the said John Strickley and Ellen Strickley, and the said John Strickley and Ellen Strickley having obtained a writ of error and filed a copy thereof in the clerk's office of said court to re-
103 verse the judgment in the aforesaid suit, and a citation directed to the said Highland Boy Gold Mining Company, a corporation, citing and admonishing *them* to be and appear at a session of the Supreme Court of the United States to be holden at Washington on the — day of February, 1905.

Now the condition of the above obligation is such that if the said John Strickley and Ellen Strickley shall prosecute the said writ of error to effect and answer all damages and costs if they fail to make

the said plea good, then the above obligation to be void, else to remain in full force and virtue.

JOHN STRICKLEY.
ELLEN STRICKLEY.
GEO. MULLETT.
FRED A. SLADE.

Sealed and delivered in the presence of
FRANK HOFFMAN.

Approved.
ROBERT N. BASKIN,
Chief Justice of the Supreme Court
of the State of Utah.

Dated this 19th day of December, 1904.

104 UNITED STATES OF AMERICA:

STATE OF UTAH, } ss:
County of Salt Lake, }

I, H. W. Griffith, clerk of the supreme court of the State of Utah, pursuant to a writ of error to said court, issued in the case wherein John Strickley and Ellen Strickley are plaintiffs in error, and The Highland Boy Gold Mining Company, a corporation, is defendant in error, do return attached hereto a transcript of the record and proceedings had in said court and cause, together with a copy of the judgment of said court, opinion, and bond filed herein; also the original application for writ of error, writ of error, assignments of error, and citation issued in said cause.

And I further certify that the said transcript of proceedings, judgment, opinion and bond, are full, true, and correct copies of the originals now on file or of record in my office.

In witness whereof, I have hereunto set my hand and affixed the seal of said supreme court, this the 20th day of January, A. D. 1905.

[Seal Supreme Court, State of Utah, Jan. 4, 1896.]

H. W. GRIFFITH,
Clerk Supreme Court.

105 In the Supreme Court of the United States.

JOHN STRICKLEY ET AL., Plaintiffs in Error,
vs.
THE HIGHLAND BOY GOLD MINING COMPANY, Defendant in Error. } Stipulation.

To the clerk of the Supreme Court of the United States:

It is here stipulated and agreed that the following portions of the record on the writ of error from the supreme court of the State of Utah may be printed and none other:

First. The plate from which the map on page 10 of the abstract of the record used in the supreme court of Utah was printed may be used in place of the original map.

Second. Print all of the record certified to by the clerk of the supreme court of the State of Utah in the writ of error, including the judgment and opinion of the supreme court of the State of Utah and all papers and records included in said certificate excluding all evidence, together with the following portions of the record as contained in the abstract used in the supreme court of the State of Utah:

Plaintiff's complaint, including map, pp. 1–10.
Exhibit "A," pp. 18–20.
Demurrer to complaint, p. 21.
Order to occupy, pp. 22–23.
Amended demurrer, pp. 25–26.
Amended answer, pp. 27–35.
Exhibit "C," pp. 94–99.
Print commencing on the 5th line from the bottom of page 94 at the words "Mr. Hoffman" up to and including the word "value" on the 5th line from the top of page 99.

106 Amendment to answer, pp. 99–101.
Commencing with the words "Mr. Van Cott" on the 11th line from the bottom of page 99 to the word "amendment" on the 5th line from the top of page 101.
Decision of the court, pp. 101–103.
And the proceedings had, pp. 104–105.
Findings of fact and conclusions of law, pp. 105–110.
Interlocutory decree, pp. 110–112.
Final order of condemnation, pp. 112–116.
The following is also to be printed as part of the record: "In "part, in the proceedings to condemn, the evidence tended to prove; "The mines of the plaintiff are situate near the head of Carr "fork, Bingham canyon, which is about two miles above the "town of Bingham, and in altitude about 1200 feet. The town of "Bingham is about 1500 feet above the valley. The tramway ex- "tends from the plaintiff's mines to the town of Bingham, a dis- "tance of about two miles. The tramway consists of two cables,

"supported on wooden towers. The towers are spaced at irregular "intervals and in some cases about a thousand feet apart, depend- "ing upon the contour of the ground, so as to pass over the valleys "and deep gulleys and to get over the ridges. A tramway cannot "run in a curved line, it must be straight. The Argonaut mining "claim is situate on a mountainside. There is some small brush on "it, but no timber. Bingham canyon is almost entirely devoted to "mining.

"That of the four towers erected by the defendant in error on the "Argonaut No. 1 placer mining claim three of them are erected
"within a space of about 150 feet in length along the line of
107 "the tramway, while the fourth is about 350 feet distant from
"the third tower."

The pages above referred to are from the abstract of record of the supreme court of the State of Utah.

ARTHUR BROWN,
FRANK HOFFMAN,
Attorney- for Plaintiff- in Error.
GEORGE SUTHERLAND,
WALDEMAR VAN COTT,
E. M. ALLISON, JR.,
Attorneys for Defendant in Error.

108 [Endorsed:] File No. 19,620. Supreme Court U.S. October term, 1904. Term No. 520. John Strickley *et al.*, pl'ffs in error, *vs.* The Highland Boy Gold Mng. Co. Stipulation as to printing record. Filed May 17, 1905.

Endorsed on cover: File No. 19,620. Utah supreme court. Term No. 172. John Strickley and Ellen Strickley, plaintiffs in error, *vs.* The Highland Boy Gold Mining Company. Filed January 30th, 1905. File No. 19,620.

FILE COPY.

Office Supreme Court U. S.
FILED
SEP 20 1905
JAMES H. McKENNEY,
Clerk.

In the Supreme Court of the United States

OCTOBER TERM, 1905.

No. 172.

JOHN STRICKLEY, ET. AL., PLAINTIFFS IN ERROR,

vs.

THE HIGHLAND BOY GOLD MINING COMPANY, DEFENDANT IN ERROR.

Brief of Plaintiff in Error.

ARTHUR BROWN,
FRANK HOFFMAN.
Attorneys for Plaintiffs in Error.

In the Supreme Court of the United States

OCTOBER TERM, 1905.

No. 172.

JOHN STRICKLEY, ET. AL., PLAINTIFFS IN ERROR,

vs.

THE HIGHLAND BOY GOLD MINING COMPANY, DEFENDANT IN ERROR.

Brief of Plaintiff in Error.

STATEMENT.

This case is brought here by Writ of Error to the Supreme Court of the State of Utah (Rec. p. 33) to review the judgment of that court, affirming the judgment and decree of the District Court of the Third Judicial District, by which judgment was rendered in favor of the plaintiff, defendant in error here, condemning certain portions of the Argonaut No. 1 Placer Mining Claim, to the use of the plaintiff, defendant in error here, for the purposes of constructing an aerial tram-way over the said Argonaut No. 1 Placer Mining Claim, the property of the plaintiffs in error, the defendant in the action below. The suit was brought in the ordinary form under an act of the Legislature of the State of Utah, entitled Chapter V., *Eminent Domain*, commencing on page 794, Section 3528, Revised

Statutes of Utah for 1898, with the various amendments thereto.

The case coming on for trial, and a hearing had, both parties plaintiff and defendant, introduced their evidence and the trial court made its Findings of Fact, Conclusions of Law and entered a Final Decree of Condemnation, to all of which the defendants below, plaintiffs in error here, excepted. (Rec. p. 74-79.)

The object and purpose for which the defendant in error seeks to condemn is fully stated in the plaintiff's complaint in the action as originally brought, and the map, Exhibit "A," attached thereto. (Rec. pp. 1-5.) A preliminary order to occupy was issued in the first instance by the trial Court. (Rec. p. 7.) Before the hearing, defendant, after leave of the Court was obtained, filed an amended Demurrer to said complaint (Rec. p. 8), and an amended answer to the said complaint. (Rec. p. 9.)

Inasmuch as the record made by the pleadings thoroughly defines the issues raised by this Writ of Error, it has not been deemed necessary to embody in the printed record here any of the testimony introduced in the Trial Court as this Writ of Error is prosecuted purely on questions of law and not of fact except so far as the facts relate to the question of a public or private use.

The sole object, use and purpose for which the defendant in error seeks to condemn the mining claim in dispute is set forth in its Complaint the material allegations of which are as follows:

> "1. That the said plaintiff is a mining corporation, organized under the name aforesaid on or about the 20th day of October, 1896, under the

laws of the State of New Jersey and now existing and doing business as such in the State of Utah at all times herein referred to. That the said plaintiff, by its articles of incorporation, was organized and authorized, and still is authorized to acquire, construct, maintain and operate aerial tram-ways for the transportation of ores, materials and the things generally used in and about the operation of mines, and amongst other things the said plaintiff was and is authorized to acquire, construct, maintain and operate an aerial tram-way from its mining properties situate in West Mountain Mining District, Salt Lake County, Utah, in an easterly direction down to the depot of the Rio Grande Western Railway Company, which is situated in Bingham Canyon, in said Mining District, and said plaintiff several years heretofore constructed such tram-way from its said mines to the depot, and heretofore has been and now is operating such aerial tramway for the uses and purposes aforesaid."

"2. That the said plaintiff desires to operate said aerial tramway from its said mines situate near the head of Bingham Canyon, in the western part of said Mining District, and situate in Salt Lake County, in an easterly direction, for a distance of about two and one-half miles, more or less, and ending at the said depot, and to that end the said plaintiff heretofore surveyed and definitely located and constructed said aerial tramway, and heretofore has been using the same for the transportation of its ores, materials and everything used in and about the operation of a mine. That the property hereby sought to be condemned and to be taken possession of by said plaintiff, is crossed by said aerial tramway, and such property is necessary to the use of said plaintiff as a right of way for the operation of such aerial tramway, which property has not heretofore been

appropriated to any public use." (Rec. pp. 1-5.)

That prior to bringing its action, which is now in issue before this Court, the plaintiffs in error brought their action in the Third Judicial District Court of the State of Utah, against the defendant in error here, in which said action plaintiffs in error here was plaintiff, and the defendant in error was defendant, to recover possession of that portion of the Argonaut Mining Claim, then occupied by the defendant in error here, the title of which action was "Strickley, Plaintiff, vs. The Highland Boy Gold Mining Company, Defendant."

The defendant in error here requested that said cause be transferred to the United States Circuit Court for the State of Utah and filed an Amended Answer in said Circuit Court; which said Amended Answer was introduced in said Court on the trial of this cause and which more fully sets forth the users and purposes for which the property was sought to be condemned, and is as follows:

> "And for a further answer and also by way of counter-claim, the defendant alleges:
> 'That prior to the construction of said tramway and the alleged wrongs set forth in the complaint, the defendant was and still is a corporation organized under the laws of the State of New Jersey, and with franchises and powers to acquire, own, work and operate mines, smelters and other reduction works, and to extract, transport to smelters and markets, and reduce by smelting and otherwise, mineral ores, and to carry on a general mining and smelting business in the State of Utah and elsewhere, and in connection with said business to own and operate tramways to carry

its ores from its mines to railroads for shipment to smelters or market.

'That prior to the alleged wrongs it had established and has kept its principal office for the State of Utah in Salt Lake City, Utah, and filed with the Secretary of the State of Utah, and with the County Clerk of Salt Lake County, Utah, a certified copy of its articles of agreement, certificate of incorporation, and by-laws and also by resolution of its board of directors, accepted the provisions of the constitution of the State of Utah, and designated an agent in the City and County of Salt Lake, Utah, upon whom process issued by authority of or under law of the State of Utah may be served, and filed a certified copy of said resolution in the office of the Secretary of State of the State of Utah, and in the office of the Clerk of Salt Lake County, in said State.

'That defendant had acquired and was working and still owns and is working a group of claims situated in West Mountain Mining District, Salt Lake County, Utah, consisting of the Henry M. mining claim, U. S. Lot, 122, the Omaha mining claim, U. S. Lot 141; the Highland Boy mining claim, U. S. Lot 350; the Nina Fraction mining claim, U. S. Lot 328; the Lorena mining claim, U. S. survey No. 3274; the Hillside mining claim No. 3274; the Hillside Mining claim, U. S. survey No. 3210, and a large number of other mining claims adjacent thereto and to each other, embracing in all 300 acres, more or less, of mining ground.

'That in working its mines it has employed over 100 men and expects to employ double that number in the future. That in connection with working its mines it has constructed and is operating a smelter in the Jordan Valley about 18 miles distant from its mines, where it smelts its ores and had employed about 125 men, and will employ hereafter not less than 200 men; the amount of ore extracted from its mines and

reduced at the smelter has been over 225 tons per day and will be increased to 450 tons per day.

'That its mines are situated on the westerly side of Bingham Gulch, about two miles from and at a considerable height above the gulch. That the only railroad in the camp is in the gulch and it is necessary for the defendant to get its ores down to the railroad for transportation to its smelter or any market.

'That the ore produced from its mines is what is considered low grade, and to make its mining profitable, must be extracted in large quantities and with economy in mining, transportation and reduction, and it is necessary to defendant to transport its ores from the mines to said railroad by power and more cheaply than by wagon haul.

'That for such purpose the defendant constructed a wire rope, overhead tramway on what is known as the Bleichert system from its mines to said railroad, a distance of about two miles, which is operated by gravity and steam power at the mines, and consists of two cables about 8 feet apart, and with supporting towers resting on the ground, and said tramway was constructed and has ever since been operated over and with towers on the Argonaut No. 1 Placer mining claim for a distance of 959.7 feet. That it is necessary for the practical operation of said tramway that it shall be and it is, on a straight line for its entire length, and any break or interruption of the line would destroy its whole value.' " (Rec. pp. 13-14.)

The issue raised by defendant below, plaintiff in error here in his answer is as follows:

"Defendants further answering admit that for more than two years prior to the bringing of this action, the plaintiff had constructed and ever since has operated its said aerial tramway over and upon the premises described in plaintiff's

complaint as the Argonaut No. 1 Placer mining claim, the property of these defendants; but these defendants allege that the plaintiff's entry into and upon said Argonaut No. 1 Placer mining claim for the purposes of constructing said tramway and the operation thereof and the appropriation of defendant's premises therefor, was and is unlawful and without right, and was and is a continuous trespass.

'That they are the owners in fee and entitled to the possession of the Argonaut No. 1 Placer mining claim with metes and bounds as described in plaintiffs' complaint.

'That the said claim is valuable for the gold contained therein. That in order to work the same to any advantage, the larger portion of the gold bearing gravel can only be worked by hydraulic process; the method commonly known among miners as "ground sluicing."

'That in order to so work, the claim, it is necessary that the defendants have the sole and exclusive use and occupation of all the surface ground included within the boundaries of their claim.

"That the tramway so erected and operated by the plaintiff is erected along the line near the center of the Gravel Channel of said claim throughout nearly the entire length of the claim.

'Beginning at the extreme southwesterly portion of said claim and extending northeasterly to the northeasterly corner thereof; that it is impossible to work by means of ground sluicing and to extract the gold therefrom while the plaintiff's towers and tramway remain on said ground and are operated as they are at the present time.

'That to grant the easement prayed for in plaintiff's complaint and give it the perpetual right to use and operate said tramway and maintain its towers over that portion of the premises sought to be condemned, would render the working of defendant's mine impossible and destroy the value thereof.

'That defendants own and hold said Argonaut No. 1 Placer mining claim by a patent from the Government of the United States, which said patent conveys to them the exclusive right of all the surface ground included within the boundaries of said mining claim and all the minerals therein contained with the exclusive right to work and mine the same.

'The plaintiff's claim of an easement and of the right to use and occupy the said premises is unjust, contrary to law and without any right or equity whatever.

'That defendant Strickley is the owner in fee of the Argonaut No. 1 Placer mining claim.

'That defendant, Ellen Strickley, is his wife, and the only interest or claim said Ellen Strickley has in said property is her dower right.

'The defendants further allege that the construction and operation of said tramway is solely and exclusively for private use, to enable the plaintiff to transport its ores from its mines to the depot in West Mountain Mining District a few cents a ton cheaper than it could be transported in any other way, which fact appears in plaintiff's complaint on file in this action and plaintiff's Pleadings in the case of John Strickley vs. The Highland Boy Gold Mining Company in the United States Circuit Court for the State of Utah, hereinafter referred to; and that the operation of said tramway and the use and occupance of defendant's premises is solely for private use and not for public use.

'That the taking of defendant's said ground by the plaintiffs and the use and occupation thereof for such private use and benefit is contrary to the provisions of the 14th Amendment to the Constitution of the United States, and is unauthorized by law.' " (Rec. pp. 28-29.)

The evidence introduced on the part of the plaintiffs in error as well as the defendant in error was all confined

strictly to the issues raised by the pleadings. The Findings of Fact of the trial Court (Rec. pp. 16-19) on the Interlocutory Decree and the Decree (Rec. p. 19), together with the Findings of Fact on the Final Order of Condemnation (Rec. pp. 20-21) and the Judgment based thereon were all made in accordance therewith, excepting in so far as the plaintiffs in error, both in the trial Court and in the Supreme Court of the State of Utah raised the question as to whether or not the owner of one mining claim had the right to condemn another mining claim for the more convenient use and purpose of working his own claim, which question the trial court refused to pass upon. (Rec. p. 16.)

This question was also ignored by the Supreme Court of Utah. (Rec. pp. 22-27.)

In this connection, while not in the order specified in Rule 21 of this Honorable Court, in referring to briefs, for the convenience of this court and as a part of the statement, I beg leave to cite the provisions of an act of the Legislature of the State of Utah, entitled "Eminent Domain."

Section 3588, (Compiled Laws State of Utah, p. 794), is entitled as follows:

> "3588. *Exercised in Behalf of What Uses.*—Subject to the provisions of this chapter, the right of Eminent Domain may be exercised in behalf of the following public use: * * *
>
> Subdivision 6.
>
> "Roads, railroads, tramways, tunnels, ditches, flumes, pipes, and dumping places to facilitate the milling, smelting or other reduction of ores, or the working of mines; outlets, natural or

> otherwise, for the deposit or conduct of tailings, refuse or water from mills, smelters or other works for the reduction of ores, or from mines; mill dams, natural gas or oil pipe lines, tanks or reservoirs; also an occupancy in common by the owners or possessors of different mines, mills, smelters or other places for the reduction of ores, of any place for the flow, deposit or conduct of tailings or refuse matter."

Section 3590 (p. 795), entitled "*Property Subject to Condemnation,*" provides that "the property which may be taken under this chapter includes: * * *

> '3. Property appropriated to public use; provided, that such property shall not be taken unless for a more necessary public use than that to which it has been already appropriated."

These subdivisions have never been altered or amended, but are the laws in force in Utah today.

ASSIGNMENT OF ERRORS.

The Supreme Court of the State of Utah erred in affirming the judgment of the trial court and holding and adjudging:

1st. That the use to which the defendant in error was seeking to condemn the property of the plaintiffs in error was a public use as defined by the 14th Amendment to the Constitution of the United States.

2nd. That the plaintiff in the trial court had the right to condemn another mining claim held under a patent from the Government of the United States for the sole and exclusive use of working its own adjacent mining claim.

3rd. The Supreme Court of the State of Utah further erred in refusing to distinguish between the uses and

purposes to which the defendant in error was seeking to condemn the property of the plaintiffs as contained in its own declaration and pleadings from the broad question whether or not the working and development of a mining claim is a public benefit and a public use, or in other words, whether or not the development of the mining resources of any State is a public or private enterprise.

4th. The court further erred in failing to determine the difference between the rights of one mine owner seeking to condmn the property of his neighbor, another mine owner for the more convenient use and purpose of conducting the same business that his neighbor was conducting.

ARGUMENT.

It appears from the pleadings in this action that the defendant in error, both in its complaint in the action in which judgment was had and from which this writ of error was prosecuted, found on page 1 of the Record, and in the answer to the complaint of the defendant in error, filed in the United States Circuit Court in a former action between these parties, found on page 13 of the Record, that the defendant in error is the owner of a group of mines situated in Bingham Canyon, West Mountain Mining District, State of Utah, and that the plaintiff in error is the owner of a placer mining claim situated in the same district at a distance of less than two miles from the mines owned by the defendant in error.

Long befere the formation of the Highland Boy Gold Mining Company, the defendant in error and long before

it had acquired any of its property, the plaintiff in error had procured a patent from the Government of the United State for the Argonaut No. 1 Placer Mining claim and at the time of the construction of defendant's tramway, he was occupying and working said claim. According to the allegations in the answer of the plaintiff in error in the trial court, which were not controverted, the Argonaut being a placer mining claim, it is necessary in operating the same that the plaintiff in error have possession and control of all of the surface of said mining claim.

According to the allegations contained in the pleadings of the defendant in error, its claims are situated about two miles above the town of Bingham. That their ores are what are determined as low grade and it is necessary in their opinion, that they should be transported from the mines to the depot in Bingham Canyon as cheaply as possible, hence they decided that it would be advisable and most advantageous to them to construct an aerial tramway to transport their ores. That transportation by that means would be cheaper than by wagon haul. There is a good wagon road from defendant's mines to the depot and has been ever since the formation of the Highland Boy Gold Mining Company, and the beginning of the operation of its mines.

According to the admissions in the pleadings of the defendant in error, the construction of this tramway was not a matter of necessity, but it was constructed solely for the purpose of reducing to a minimum the cost of transporting its ores from its mines to the depot. The sole and only use and purpose to which this tramway is put is for the transportation of the ores of the defendant in

error. No other use or benefit is claimed for it by the defendant in error. The public is in no manner interested in it, nor does the public derive any benefit from the same. In the very nature of its construction and in the manner of its operation, no passengers can be carried over the tramway, nor does it receive, transport or deliver any freight of any kind or description. It is operated solely, exclusively and entirely for the benefit of the defendant in error. How can it be contended for an instant, then, that the use of this tramway is a public use or a public benefit? The tramway not being operated as a public use or for a public benefit, I fail to see how the defendant in error can claim the right to condemn even under our Statute of Eminent Domain, which especially provides that the land sought to be condemned must be used for a public use. The defendant has not even the excuse that it is necessary or a matter of necessity that this tramway was built for the operation of its mines. Its only claim is that it is a matter of convenience and the sole object and purpose of its construction was to save a few cents a ton in the cost of transporting its ores. This being true, we earnestly contend that in so far as the operation of this particular group of mines is concerned and the transportation of its ores, it has no right to condemn the property of any other person.

I think it must be conceded that the question as to whether the use to which the person seeking to condemn the land of another puts the land so condemned, is always a question to be determined by the courts.

In Bankhead vs. Brown, 25th Iowa Reports, page

540, Chief Justice Honorable John F. Dillon, in delivering the opinion of the court, said, page 545 * * * *

> "3. When the public exigencies demand the exercise of the power of taking private property for the public use, is solely a question for the legislature, upon whose determination the courts cannot sit in judgment." (See Cases cited.)
>
> "4. That what is such a public use as will justify the exercise of the power of eminent domain, is a question for the courts." (See cases cited.)

In fact this doctrine is held in all of the cases hereinafter cited in this Brief where the question is raised.

Before entering upon the argument and citing the authorities as to whether the use to which the defendant in error sought to condemn the property of the plaintiff in error was a public use or a private use, I wish to call the court's attention briefly to Section 3590 of the Compiled Laws of the State of Utah, of 1898, page 795, hereinbefore cited.

> "Subdivision 3, property appropriated to public use; provided, that such property shall not be taken unless for a more necessary public use than that to which it has already been appropriated."

From this it will appear that inasmuch as the premises known as the Argonaut No. 1 Placer mining claim which is herein sought to be condemned, had, long prior to the organization of defendant company been known, held, patented and worked as a mining claim and all of the premises included within the boundaries of the patent were appropriated to a public use under the Statutes of our State. That being true, Sec-

tion 3590 of the compiled laws last above quoted would certainly preclude the defendant in error from seeking to appropriate the same premises to the same public use. This question both the trial court and the Supreme Court of the State of Utah entirely ignored, although the attention of both courts was called to this specific question. (See page 16 of the Record, and the opinion of the Supreme Court of the State of Utah, page 22 of the Record.)

Since the adoption of the 14th amendment to the Constitution of the United States, the question as to how far the legislators of the country could legislate on the right of Eminent Domain and to what extent the private property of citizens of the United States could be appropriated or condemned to public use and as to what constitutes such a public use and what justifies the condemnation of private property to be made, has been the subject of heated legal controversy in almost every State in the Union. In fact the adoption of the 14th amendment to the Constitution of the United States but reiterates and puts in legal phrase and effect the inherent right of a person to protect his property and be protected in his property, his person and his liberty, which has been recognized as long as our Government has existed. Section 7, Article 1, of the Constitution of the State of Utah, contains the same provision, to-wit:

> "No person shall be deprived of life, liberty or property without due process of law."

The New England States in early laws recognized the importance of the manufactoring interests and on account of their limited agricultural resources, had adopted Statutes similar in effect to that adopted by the

State of New Hampshire, commonly known as Mill Site Acts, which in effect authorized any person or corporation authorized by its charter so to do, to erect or maintain upon his or its own land or upon the land of another with his consent, a water mill and demand of that person the waters for working it or creating or equalizing a flow of water for its own use and for the use of the mills below or upon and across the streams not navigable and upon the terms and conditions and such other regulations as are conferred in such acts.

This Legislature further provided that if the consent of the owner of the ground so to be occupied could not be obtained then various methods of acquiring title to the premises so to be occupied are provided for, in effect the same as have been adopted by the various States under acts variously entitled, but all of which relate to the subject of eminent domain.

One of the most important of these cases that were heard and decided by this Honorable Court under the mill site acts, was the case of Head vs. The Amoskeog Mfg. Company, 113 U. S. Reports, page 9. This case is remarkable both for the ability of the counsel representing the parties as well as for the care and consideration bestowed upon it by the court, and while the decision in that case was in favor of the right to condemn, we hold that it in no way affects the present case on its merits. The mill site act above referred to is contained in full on page 10 of the case above cited.

It will be seen from a reading of this act which is similar to all of the mill site acts adopted by the New England States that there is a special provision prohibiting

the appropriation of one mill site or contemplated mill site by another for the same purpose.

This is in effect similar to the provisions of Section 3590, page 795 of the Compiled Laws of Utah, heretofore quoted, which provides:

> "That property appropriated to a public use should not be taken unless for a more necessary public use than that to which it has already been appropriated."

Recognizing this principle the construction of the tramway by the defendant in error over the Argonaut No. 1 Placer Mine is contrary to the Statute, that property having already been appropriated for mining purposes, cannot be condemned to be used by another person for a like purpose.

Inasmuch as this is a mining case exclusively and recognizing the fact that in almost all of the States in which the mining industry has acquired any considerable importance, the Legislatures of such States have, by various enactments, framed laws for the protection and regulation of the mining industry, we will confine our argument and citation of authorities to mining cases exclusively and will commence with the State of California, which in its early days was peculiarly a mining State and from which our earliest mining laws were obtained.

The Consolidated Channel Company vs. The Central Pacific Railroad Company, 51st California, page 269.

In this action the plaintiff was a corporation and was the owner of and engaged in working a gold mine on Squirrel Creek in the County of Nevada. The grade of the creek below the mine was light and the only practica-

ble method of working the mine was in excavating a ditch, building a flume through the mine, and for a considerable distance below so as to carry off the tailings and have a place for the deposit of the tailings near the flume. In order to do this, it was necessary to pass over and use land belonging to the defendant.

Action was brought in the District Court for the purpose of condemning a right of way over the land necessary.

A Demurrer to the complaint was sustained. Plaintiff stood on his complaint and appealed. The judgment was in favor of the defendant and sustaining the Demurrer. The court, on page 271, says:

> "The plaintiff, by this proceeding, sought to procure by condemnation, certain lands belonging to the several defendants to serve as a site for a bed-rock flume to carry the dirt and gravel from its mining claims; and also as a place of deposit for the tailings and refuse matter from its claims.
>
> "The demurrer raises the question of the constitutionality of sub-division five of section one thousand two hundred and thirty-eight of the Code of Civil Proceedure, authorizing proceedings of this character.
>
> "This statute provides that the right of eminent domain may be exercised in behalf of certain enumerated public uses, and in sub-division five names, among other things, 'tunnels, ditches, flumes, pipes and dumping places for working mines; also outlets, natural or otherwise for the flow, deposit or conduct of tailings or refuse matter from the mines.'
>
> "It is clear from the averment of the complaint, that the object sought is the appropriation of the private property of the defendants to the private use of the plaintiff. The proposed

flume is to be constructed solely for the purpose of advantageously and profitably washing and mining plaintiff's mining ground. It is not even pretended that any person other than the plaintiff will derive any benefit whatever from the structure when completed. No public use can possibly be subserved by it. It is a private enterprise, to be conducted solely for the personal profit of the plainti,ff and in which the community at large have no concern. It is clear that this case does not come within the meaning of that clause of the Constitution which permits the taking of private property for a public use after just compensation made.

"But it is contended by the counsel for the plaintiff that the statute referred to (Section 1238, Subdivision 5, C. C. P.) is a legislative declaration that the construction of ditches, flumes and dumping places for working mines, are public uses, in behalf of which the right of eminent domain may be exercised; and they invoke the doctrine that the judgment of the Legislature upon such questions is conclusive, and is not open to review by the judicial department of the Government. Without doubt it is the general rule that where there is any doubt that the use to which the property is proposed to be devoted is of a public or private character, it is a matter to be determined by the Legislature, and the courts will not undertake to disturb its judgment in this regard. This question was fully discussed and the doctrine established, in the case of S. & V. R. R. Co. vs. City of Stockton (41 Cal. 147.) But in the same case an exception to the general rule is recognized. It is said: 'A case might indeed be presented in which it might appear, beyond the possibility of a question, that a tax had been imposed, or the property of a citizen had been taken for a use or purpose in no sense public; or, in the language of Chancellor Walworth (5 Paige, 159,) "where there was no foundation for a

> pretense that the public was to be benefited thereby;" and in such case it would be our duty to interfere and afford relief.' "
>
> "It would be difficult to suppost a case more completely within the exception stated, and in which the absence of all possible public interest in the purposes for which the land is sought to be condemned is more clear and palpable than in the case at bar."

The People, ex rel, etc. vs. The Pittsburg R. R. Co., 53rd Cal., 694. This was an action brought in the name of the people to annul a franchise given to the defendant and to dissolve the incorporation.

The complainant in his petition alleged that in September, 1861, certain parties formed a corporation called the Pittsburg Coal Mining Company, for the purposes of mining coal in Contra Costa County. That for such purpose it became desirable to have a railroad running from the mines through the Rancho Los Medanos, about five miles to the San Joaquin river in order to transport their coal to a more convenient place for shipment. In order to avail themselves of the power of eminent domain, these parties, with others, created another corporation, naming it the Pittsburg R. R. Company, and in order to bring themselves within the act of eminent domain, declared in their articles of incorporation that the purpose of the new company was to transport freight, passengers, etc. Under these allegations, they succeeded in condemning a portion of the Los Medanos Rancho, which was the private property of the relator, the petitioner in the case.

After the railroad was constructed, it was engaged exclusively in carrying coal from the defendant's mines to the river, having no facilities for carrying either pas-

sengers or freight or any other conveniences for the public, being used solely for the purpose of transporting coal from defendant's mines to the river. Upon this statement of facts, the court says, page 697:

> "The demurrer to the complaint was improperly sustained. In its proceedings for the condemnation of Los Medanos Rancho for railway purposes, the defendant (assuming to exercise the eminent domain) purported to act as agent for the State in the appropriation of private property for *public use*. It now appears by the complaint, however, that this assumption was a mere false pretense; that the use for which those lands were taken was, in fact, a mere private use, and one to which the eminent domain is of course inapplicable. The proceedings in condemnation amounted to an imposition upon the Court before which they were had.
>
> "It is certainly competent for the State, upon discovering the misuse of its authority, whereby the private property of one of its citizens has been wrongfully taken for the private use of another, to interpose, by its Attorney-General to correct the abuse.
>
> "Judgment reversed and cause remanded, with directions to overrule the demurrer to the complaint. Remittitur forthwith."

It would be difficult to find two cases more alike than the above California cases and the case before the Court. The provisions of the statute relating to condemnation being the same and the uses and purposes to which the property sought to be condemned was to be applied being the same, the decisions of the California Court could apply to this case with equal certainty.

This same doctrine has been established in the State

of Illinois, the home of the most prosperous people on this continent.

Sholl vs. The German Coal Company, 118 Illinois, page 427.

In this action, the German Coal Company, a corporation organized under the General Incorporation Act of the State of Illinois for the purposes of mining and selling coal, filed its petition in which it sought to condemn a strip of land belonging to Sholl the appellant in the action. The purposes for which this land was sought to be condemned was for the extension of a tramway belonging to the Respondent Company in order that it might connect its mines with a public railroad for the purpose of more conveniently and economically shipping its coal from its mines to a station on a public railroad. The case is identical with the case here. The only object that the respondent German Coal Company had in condemning appellant's property was to transport its own coal over its own private tramway from its mines to a point on a public railroad, from whence it could then be transported to the market. The tramway was to be constructed and operated for that sole purpose the same as the aerial tramway over the Argonaut No. 1 Placer mining claim is used for the transportation of the ores from the mines of the Highland Boy Gold Mining Company to a point on a public railroad.

The syllabus of the case is as follows:

"1. The right of eminent domain being an inherent attribute of sovereignty, exists independently of written constitutions or statutory laws, though its exercise is usually regulated by appropriate legislation.

"2. The right is founded on public utility and necessity, and its exercise is a strictly legislative function and subject to the right of the courts to determine whether the use for which property is sought to be taken is a public one, and whether the proceedings have been conducted according to the law made on the subject, but the legislature is the exclusive judge of the necessity or emergency justifying the exercise of the power.

"3. The business proposed to be done and the manner of doing it, must be looked at in determining whether the use to which property is be devoted will be a public or a private one. If, from the nature of the business and the way in which it is to be conducted, it is clear no obligation will be assumed to the public or liability incurred other than such as pertains to all strictly private enterprises, then the use is private and not public.

"4. The use of a strip of land by a coal company, upon which to construct a tramway leading from the coal works to a railroad track, is a private use, and such a strip cannot be condemned under the Eminent Domain Act for such use."

Quoting from the opinion of the court, pages 430-431:

"The German Coal Company, a domestic corporation organized under the General Incorporation Act, for the purpose of mining and selling coal, filed a petition under the Eminent Domain act, in the County Court of Peoria County, for the purpose of acquiring, by condemnation, the right of way over a small strip of land belonging to the appellant, Adam Sholl, and lying between the company's coal works and the Peoria and Pekin Union railroad. The piece of land sought to be condemned was wanted for the extension of a tramway belonging to the company, so as to connect with the railway, and thus secure to the company rail-

road facilities for the transportation of its coal. The right to condemn the property for such purpose was resisted by the defendant from the outset, as violative of the constitution of the state. The objection, however, was overruled, and after a very vigorous and somewhat protracted contest, the court entered an order of condemnation, upon the payment of $500 to the defendant."

Again, commencing on page 432:

"The question, then, whether the use in the present case is a private or public one, is not only directly presented, but it is of controlling importance in the event it should be determined against the petitioner, for whatever our views might be on the other questions discussed by counsel, the judgment below would have to be reversed. As before stated, the decided cases furnish no universal test by which it may be described or defined, and the attempts to do so have resulted in more or less conflict.

"Without attempting to define a public use, or to give such a test, a few general observations on the subject may not be inappropriate. The expression 'public use' *ex vi termini*, implies an interest or right of some kind in the public, and as the public can have no existence separate and apart from the people, of which it consists, it follows, that this interest or right, whatever it is, belongs to and is vested in the people. This being so, it is the duty of the State to see that it is properly protected. Without attempting, as we might if the question were an original one, to determine the nature and extent of this interest or right, we have no hesitancy in saying, that if the use is a continuous one, as it is in all cases where property is taken for the purposes of a public ferry, railway, or the like, the right or interest of the public is co-extensive with the use to which it is annexed, and that it is not within

the power of those exercising the franchise to deprive the people of the benefits resulting therefrom. Persons or corporations condemning property for such purposes, assume certain obligations and duties to the public, which they cannot disregard without forfeiting their franchises, and otherwise rendering themselves liable. In all such cases, the character of the business proposed to be done, and the manner of doing it, must be looked into in determining whether the use will be a public or a private one. If, from the nature of the business and the way in which it is to be conducted, it is clear no obligations will be assumed to the public, or liability incurred, other than such as pertain to all strictly private enterprises, it may safely be concluded the use is private and not public. It is also believed to be generally, if not universally, true, that benefits resulting from a public use, capable of individual appropriation, are open to all alike, upon the same terms and conditions.

"Viewing the question before us in the light of the general principles here stated, it is clear the use for which the land is proposed to be taken in this case is not a public one. The coal, the coal works, and the present tramway, are in the strictest sense, private property, and the public, generally, have no more interest in them or in the operation of the works, including the tramway, than they have in any other strictly private business. The same would be equally true after the proposed extension of the tramway. The extending of it to the railroad would not change its character, or the obligations of the company to the public, in the slightest degree. Without the consent of the owners of it, there is not a person in the state, outside of themselves, who would have the right to ride upon it on any terms that might be proposed, or to have carried upon it a single

pound of freight. Indeed, nothing of the kind is contemplated or intended. It is manifest, the company now has, and after such extension of its track, would still have, the right to use it for its own private business exclusively. It could run it or cease to use it altogether, without violating any right in the public or any duty which it owes to the people. Clearly, this could not be so if the use were public, in the sense of the constitution.

"This question, however, is not a new one in this Court. It incidentally arose in Millet vs. The People, 117 Illinois, 294. The plaintiff in error in that case had been indicted, as the operator of a coal mine, for a failure to provide scales, and to weigh all coal taken out of the mine, as a basis for computing the wages of the miners, as required by an act of the Legislature approved June 14, 1883. It was urged, by way of defense, that the act was unconstitutional, in this, that it singled out owners of coal mines as a distinct class, and imposed upon them burdens not imposed on other owners of property and employers of laborers. To this it was replied that the business of mining coal, like that of railways, public warehouses, etc., was of a public character, and that, therefore, the legislature had the right, for the protection of the public, to adopt such special regulations as were deemed necessary for that purpose, and that the act in question was nothing more than a reasonable exercise of that right. The question, therefore, it will be perceived, was directly presented, whether the use in the operation of a coal mine is a public one, and it was held that it was not. To the same effect is Edgewood Railroad Co.'s Appeal, 79 Pa. St. 257.

"Upon the authority of these cases, and for the reasons stated, we are clearly of opinion that the use for which it is proposed to take appellant's property is a private and not a public one. Having reached this conclusion, it is not

necessary to consider other questions discussed in the briefs.

"The judgment below is reversed, and the cause remanded with directions to dismiss the petition."

Nesbit vs. Trumbo, 39th Illinois, 110.

This action was based upon the application by John Smith to the commissioners of highways of Woodside, Sangamon County, for a private road to be established from his farm over the land of William Nesbit and others to a public road. The commissioners granted the application and laid out the road.

The matter came before the Circuit Court upon an agreed case, the only question to be settled was as to the constitutionality of the act authorizing the establishment of private ways over the land of others against their objection. The motion to quash the proceedings of the commissioners was overruled and Nesbit sued out a writ of error.

In delivering the opinion of the court, Mr. Chief Justice Walker said, page 113:

"This record presents the question whether the act authorizing a private way, to be established over the land of an owner against his objections, is constitutional. The provision is found in the ninety-third section of the act of 1861, (Sess. laws, 263). The provision of our constitution supposed to be violated by this enactment is the eighth section of article thirteen, and is this: 'No person shall be imprisoned, or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty or property, but by the judgment of his peers or the law of the land.' Does the establishment of such a way

over a man's land disseize him of 'his freehold,' or deprive him of 'his property,' as provided in this enactment, without the 'judgment of his peers' or contrary to the law of the land?

"This is not a question of first impression in the courts of this country, it having arisen and been judicially determined in several of our sister States. In the case of Hickey vs. Tennison, 27 Mo. 373, it was held that private property cannot be constitutionally condemned and appropriated by the legislature to private uses. And it was likewise held that an act authorizing the location of a neighborhood road, which was, in fact, but a private way, was unconstitutional, and the acts performed under it were void.

"The court says: 'Our Constitution provides that no private property ought to be taken or applied to public use without just compensation. While this provision recognized the right of eminent domain in the State for public use, there is nothing which sanctions the doctrine that the property of individuals may be taken for private use, with or without compensation; such a right would be hostile to the existence of private property. * * * Hence commentators on our form of government, whilst they acknowledge the right of eminent domain in the State for the public use in its broadest terms, are unanimous in the opinion that private property cannot be taken for private use.'

"In the case of Clack vs. White, 2 Swan's (Tenn.) 540, the court says: 'Now, the statute confers power upon the County Court to grant a right of way against the will of the person who owns the land. It takes from him, *in invitum*, a part of his private estate, and gives it to another, as a private right, for such indemnity as a jury may assess. Now, we deny that any such power exists, under the Constitution of the State. The right to private property is under the protection of the Constitution and is to be held as sacred and inviolable. The leg-

islature has no power to take or invade it for any mere private purpose, or to transfer it from one person to another against the will of the owner, whether indemnity be provided for it or not. The will of the owner is, in this respect, stronger than the legislative power; and if he refuses to grant the private way, we are not aware of any power by which he may be enforced to grant it.'

"In the case of Sadler vs. Langham, 34 Ala., 311, the court says 'the legislature cannot, either with or without compensation, take private property for private use.' And the court held that the establishment of a private way over the land of another, under the statute prescribing the mode, conferred no rights, as the law was unconstitutional and void. And after the statute had been in force for upward of twenty-five years, in the case of Hoge vs. Swan, Md. 237, the court lay down the rule that the State may take private property for public use, but is powerless to take one man's land and give it to another; that it cannot do so any more than a citizen can grant what he does not own."

* * * *

And again, at the bottom of page 116, same case, the Court further says:

"Nor can there be the slightest pretense in this case that this way was, in any just sense, for public use. It was alone for individual or private use. From these decisions, the doctrine seems to be too well and firmly established, whatever may have been our preconceived opinions, to be now shaken. And to hold that the legislature might exercise this power, would doubtless open the way to other and more serious encroachments upon the right of property, which was designed to be secured by this most salutory provision. In the light of these authorities, we feel compelled to hold this provision of the law unconstitutional. And

the judgment of the court below must be reversed."

Bankhead vs. Brown, 25th Iowa, page 540.

This case is peculiarly applicable to the one at bar for the reason that the distinction between a public use and a private use is elaborately discussed, and the conclusions of the learned judge appear to be sound both as to the law and the facts. A synopsis of an Act of the Legislature of the State of Iowa entitled, "AN ACT TO PROVIDE FOR THE ESTABLISHMENT OF PRIVATE ROADS IN IOWA," is found on page 542 of the volume last above quoted. I insert here section 1 of said act:

> "By section 1 it is provided that private roads may be laid out in the same manner as county roads, and the general road laws of the State, as to the establishment of county roads, are applicable, except that it is not necessary that any person but the applicant shall sign the petition."

A reading of this section will show that the provisions contained in the Act are precisely the same as the method pursued by the defendant in error in this case to condemn the property of the plaintiff in error. While the whole opinion and all of the authorities cited could well be adopted as the law settling this case, I will quote but a part of the same as contained on pages 547-548 of the opinion.

> "With respect to the act of 1866, we are of opinion that roads thereunder established are *essentially private*, that is, are the private property of the applicant therefor, because,
>
> "First. The statute denominates them '*private*

roads' and is entitled 'an act to provide for establishing private roads.'

"If the roads established thereunder were not intended to be *private,* and different from ordinary and public roads, there was no necessity for the act.

"Second. Such road may be established upon the petition of the applicant alone; and he must pay the costs and damages occasioned thereby, and perform such other conditions as to fences, etc., as the board may prescribe.

"Third. The public are not bound to work or keep such roads in repair, and this is a very satisfactory test as to whether a road is public or private.

"Fourth. We see no reason when such a road is established, why the person at whose instance this was done, might not lock the gates opening into it, or fence it up, or otherwise debar the public of any right thereto.

"Could not the plaintiffs in this case, after having procured the road in question, abandon it at their pleasure? Could they not relinquish it to the defendants without consulting the board of supervisors? If this is so, does it not incontestibly establish that it is essentially *private?* Forit must be private if it is of such a nature that the plaintiffs can, at their pleasure, use or forbid its use, abandon or refuse to abandon it, relinquish or refuse to relinquish it.

"If the act of 1866 is valid, might not the plaintiffs, having procured the road, use it for laying down a tram or horse railway, and forbid everybody from using the road, and even exclude all persons therefrom? Who could prevent it?

"These considerations marks the great difference between such a road and a public highway, and demonstrate the essentially *private* character of the road."

In Pennsylvania, the state in which the yearly output of its mines exceeds in value the entire wealth of the

state of Utah, the courts have held universally that the taking of private property for private uses, even in the development of its great mineral resources, is unconstitutional.

In the celebrated case of the "Edgewood Railroad Company's Appeal," 79th Pa. State Reports, 257, the Court in the syllabus holds:

> "3. Nothing in the act of 1868 affected the legislation as to lateral railroads.
> "4. The supplement of April, 1871, is applicable to settled communities where the population requires more than the primitive means of conveyance and transportation, but not to promote private fortunes or develop private property.
> "5. The power of eminent domain is conferred on citizens only when some existing public need is to be supplied or some present public advantage to be gained, but not with a view to contingent results dependent upon the success of the projected speculation.
> "The railroad in this case was not for public use, within the meaning of the acts of 1868 and 1871."

Quoting from the opinion, commencing on page 269, and continuing on page 271:

> "The object for which the Act of 1868 was passed is unmistakable. It was to vest in voluntary associations of individuals, under definite, uniform and general rules, powers which has previously been given only by special acts of incorporation. It applied to railroad companies in the sense in which the term had always been commonly employed. Passenger railways were expressly excluded from its operation. The companies to be chartered under it were made subject to the provisions of the General Railroad Law of 1849, and not one word was contained in it by which the legislation in regard

to lateral railroads could be affected. The Act of the 28th of April, 1871, was a supplement to the Act of 1868, simply reducing the number of the corporators to three in the case of a road not exceeding five miles in length. These corporators, however, were still to constitute a railroad company, subject to the terms of the original act and to those of the Act of 1849. Provision for so short a road could only have been made in order to secure some general public good. The supplement was manifestly intended to apply to settled communities, with a population at least so moderately dense as to require more than primitive means of conveyance, and with industries so varied and diversified as to require more than primitive facilities for the transportation of the products of machinery, labor and land. It was passed to provide for the convenience and necessities of masses of men, and not to promote private fortunes or develop private property. The Commonwealth transfers to her citizens her power of eminent domain only when some existing public need is to be supplied, or some present public advantage is to be gained. She does not confer it with a view to contingent results which may or may not be produced, and may or may not justify the grant, as a projected speculation may prove successful or disastrous. Provision of the most ample kind has been made to meet individual requirements. The lateral railroad statutes afford every necessary facility for developing private property and transporting its products. And there are substantial reasons why the field in which those statutes operate should not be invaded. Owners of lands are protected by safeguards in their provisions which do not shield them when public ends are to be promoted. They have the right to demand the interposition of those safeguards when private property is appropriated for strictly private use.

"The facts found by the master prove in the dis-

tinctest way that this railroad is a mere appurtenance to the mines of the Hampton Coal Company. The reasons for his decision that it has been constructed for public use are speculative, strained and vague. They have in view remote and contingent conditions, of the realization of which nothing even of probability is shown by the report. The road is completed between the terminii specified in its charter. The capital of the corporation has been nearly if not entirely expended. It cannot, of course, be said that it is impossible that new capital shall be subscribed, the hill that bounds the eastern terminus tunneled, the coal lands beneath which the extension may be constructed developed and industries created that would make the enterprise of public importance and public use. But all these possibilities are too remote to be ground for anything beyond conjecture. To rest the legal rights of parties on such chances would be simply to obliterate those rights. In its existing condition, not one element of public advantage has resulted from this road that would not be gained by the construction of any lateral railroad extending from a great highway like the Pennsylvania railroad to coal mines of the kind and capacity of those of the Hampton Company. For the distance of seven hundred and eighty feet, including the eastern terminus, the defendants are precluded from affording facilities for any business, but their own, by the very terms of the grant of the right of way they obtained from Johnston. They are confined to the use of the land for such purposes as are connected with the ordinary working of coal property. 'The conveyance of persons and property,' in the sense in which those words are used in the Act of 1868, would be out of the question. The connection with the Pennsylvania railroad is at a point fourteen hundred and fifty feet from any station, nearly one-third of the entire

length of the Edgewood road, and the statement of the fact is alone sufficient to make any idea of using it for the conveyance of passengers preposterous. There is the coal of the Hampton Company to be carried, and there is nothing else."

Waddell's Appeal, 84th Pennsylvania, p. 90.

The proceedings in this case were instituted under an Act of the Legislature of the State of Pennsylvania quoted on page 90, as follows:

"That any person or persons, owners or lessees of anthracite coal in or underlying lands on both sides of any of the rivers or other streams of this Commonwealth, may have the right of way across said rivers or other streams, or any of them, from their lands on one side to those on the other side, either upon the surface or under the same, for the purpose of mining and removing said coal, by such route as shall be deemed or found to be the nearest, most practicable and convenient for the making of the said way, between the said lands, with the right to follow, mine, remove and dispose of any vein of anthracite coal or other material within the bounds of said way, upon paying the owner or owners of the land passed over or under, for the same as hereinafter provided.

"The said right of way may be made by drift, slope, tunnel, or other necessary or proper means, and shall not exceed twelve feet in width.

"That whenever any of the parties before named desire to make and have a right of way across any river or other stream under the surface of the same, through lands not belonging to them, for the purpose aforesaid, such party may present a petition to the Court of Common Pleas of the proper county, or any law judge thereof in vacation, setting forth that he or they are the owners or lessees of anthracite coal lying and being under lands on both sides of a

> river or other stream, which he or they desire to connect, for the purpose of mining the same, by a way under the said river, or other stream, and that the intervening lands, over which said river, or other stream, flows, do not belong to them, but to other parties, and that it is his or their desire to be allowed to construct and have a right of way under such river, or other stream, and praying the court to permit such party to have a right of way as aforesaid, which petition shall set forth a description of the lands on both sides of the said river or other stream which the party petitioning desires to connect and communicate with by such way, and the place of beginning and general direction, etc."

The proceedings were instituted in the Court of Common Pleas of Luzerne County and in the report of the case, the opinion of the learned judge presiding in the Court of Common Pleas is cited at length, for the reason given, that the opinion was so exhaustive that it was deemed worthy of a place in the Record.

The syllabus of the case in a condensed way, contains the law of the case which the supreme court adopted without comment, in the following language, page 100:

> "PER CURIAM.—The decree of the court below, continuing the special injuction, is affirmed, with costs to be paid by the appellants, and the appeal is dismissed."

In West Virginia, a state whose mining industries are second only to those of Pennsylvania, if indeed they are second to any in the union, where the question before this Court has been elaborately discussed, the same doctrines prevail.

> Railroad Company vs. Iron Works, 31 W. Va. 710.

Syllabus:

"1. Whether the use to which property sought to be taken under the exercise of eminent domain is public or private is a judicial question, subject to review by the appellant court."

"2. Evidence that all who wish to avail themselves of the proposed switch, branch-road or lateral work can do so, is not sufficient to show that the use of the work will be for the benefit of the public."

Quoting from the opinion on page 718, the court says:

"If the use were public, then it matters not that the Benwood Iron Works had for 20 years reserved its lot for the purpose of building a blast-furnace thereon. It could be taken for public use, and the loss to the company could be compensated in damages. The question here is not one of compensation, but it is whether the petitioner had a right to take the property. It, of course, has no right to take private property for private use, but it has the right to take private property for public use on paying a just compensation therefor. The right to take, which depends upon whether it is to be taken for public or private use, is a judicial question and the decision of the Circuit Court on that question is subject to reserve."

Railroad Co. vs. Railroad Co., 17 W. Va. 812.

The question in this case arose as to whether the land sought to be condemned by the Railroad Company was for public or private use, the Benwood Iron Works, defendant, claiming that the uses for which the said lands are sought to be taken and to be condemned for a public use, alleged that it is insufficient in law and does not show that the lands sought to be taken are to be condemned for a public use, within the meaning of the constitution of this state.

That the uses for which lands are sought to be taken,

as stated in the original petition, did not constitute a public use, and the amended petition only sets forth in more general language the uses for which the lands are sought to be taken, and does not use any language which is inconsistent with the proposed railroad being used solely for the purposes set out in the original petition. This is found on page 715.

Quoting from the opinion on page 734 to page 735:

> "The property of railroad corporations, so far as concerns the ownership thereof, and the profit and gain to be made from the use thereof, is to all intents and purposes, private property, although applied to a use in which the public have an interest. Railroad Co. vs. Railroad Co., 97 Cal. 506. Where railroad corporations seek by the exercise of the right of eminent domain to take private property for public use, the public is concerned; but as to their private interests—their property and profits—they stand as individuals or as mere private corporations, in which the public has no concern; and for such private interests the right of eminent domain cannot be invoked.,
>
> "Stripped of all the disguises thrown around the case of the petitioner, it plainly appears that its object is to condemn the land of the defendant for the purpose of enabling it to lay a siding, switch, branch-road, or lateral work from the main track to the Wheeling Steel Works, a few hundred feet distant, for the purpose as stated in the original petition, 'of transporting freights to and from said steel works for the private accommodation of both the railroads and steel works and to make the private business of both more profitable.' This was not for a public, but was for a private use, and the taking of private property for private use, which is clearly exhibited.
>
> "The learned counsel for defendant in error in his

brief says, 'No deadlier blow could be aimed at the industries of the state than that which this defendant asks the court to deal.' It seems to us, if railroad corporations were permitted *ad libitum* to do what this defendant in error asks to be done, 'no deadlier blow could be dealt the private rights of the citizens.' If the doctrine claimed by defendant in error should prevail, then corporations might go to any private place they chose, to rolling-mills, ice houses, tanneries, sugar refineries, brick-yards, grocery stores, etc., and in the county, to stone-quarries, coal mines, stock farms, etc., and if any private citizen dared to stand in the way, violently wrest his property from him for their mere private gain. In such a state of affairs, the so-called protection by the constitution of the rights of private property would by arbitrary ruling of the courts be rendered nugatory and void. The mere declaration in a petition that the property is to be appropriated to public use does not make it so, and evidence that the public will have a right to use it amounts to nothing in the face of the fact that the only incentive to ask for a condemnation was a private gain, and it was apparent that the general public had no interest in it. We would do nothing to hinder the development of the state, nor to cripple railroad companies in assisting such developments, but at the same time we must protect the property rights of the citizens. Whatever corporations may be entitled to under the proper construction of the law they will receive, but they must not be permitted to take private property for private use. The judgment of the Circuit Court is reversed and the petition dismissed." See 18th Cala. 229, Gilmer vs. Lime Point.

On page 729 of the opinion of the Court, we quote as follows:

"This court has stated that to authorize the exer-

> cise of the right of eminent domain, and the use which the public is to have of such property must be fixed and definite. The general public must have the right to a certain definite use of private property on terms and for charges fixed by law, and the owner of the property must be compelled by law to permit the general public to enjoy it. It will not suffice that the general prosperity of the community is promoted by the taking of private property from the owner and transferring its title and control to another, or to a corporation to be used by such other or by such corporation as private property uncontrolled by law as to its use. Such supposed indirect advantage to the community is not in contemplation of law and public use. The use of the property which in such case the public must have, must be a substantially beneficial use, which is obviously needful for the public to have, and without which the public would suffer great loss or inconvenience."
>
> Varner vs. Martin, 21 W. Va., 534.

In the case of Varner vs. Martin, 21 W. Va., page 534, cited in the opinion of the court in the last above case, I call the court's attention to the language of the opinion of the court, found on pages 553-557, and the voluminous authorities there cited, which sustain unanimously the following propositions.

> "5. But if the title and control of the property to be condemned is to pass into the hands and under the control of a private person, or corporation, so that they are to have it as their private property whether the public is to have such a use of or any such property as will justify this exercise of the power of eminent domain, is a question for the courts to decide. Though if a particular use of it be declared by

the legislature to be a public use, the courts will hold such use to be public, unless it manifestly appears that it is not a public use. In such case, what is a public use is a question for the courts to determine. (p. 555.)

"6. In such a case where the title and control of the property to be condemned is in private hands or in a corporation, three qualifications are necessary to impose upon such a public use as will justify the taking of such private property without the consent of the owner. (p. 556.)

"7. The use which the public is to have of such property must be fixed and definite. The general public must have a right to a certain definite use of the property on terms and on charges fixed by law; and the owner of the property must be compelled by law, to permit the general public to enjoy it. It will not suffice that the general prosperity of the community is promoted by the taking of private property from the owner and transferring its title and control to another or to a corporation to be used by such other or by such corporation as its private property uncontrolled by law as to its use. Such supposed indirect advantage to the community is not in contemplation of law and public use. (p. 556).

"8. This use of the property which in such case the public must have, must be a substantially beneficial use, which is obviously needful for the public to have, and which it could not do without, except by suffering great loss and inconvenience. (p. 557).

"9. And when the title of property is thus transferred by condemnation to an individual or to a corporation, the necessity for such condemnation must be obvious. It must obviously appear from the location of the property proposed to be condemned or from the character of the use to which it is to be put that the public could not without great difficulty obtain the use

of this land or of other land which would answer the same general purposes, unless it was condemned. And in such case, the courts allege of the necessity for confirming such condemnation. (p. 558).

"10. The road must be deemed to be a private road when its control is not under a public officer and the public is not bound to work it or keep it in order, and where an individual might obstruct its use without being guilty of any public offense. (p. 560).

"11. The legislature cannot authorize the condemnation of land to establish such private road, even though the general public welfare of the community might be promoted by the forcible opening of such private roads. On the principles above laid down the public have no such direct and tangible use of such rights as would justify the courts in regarding it as a public use, even though the public might have a right to use such private road while it was permitted to be kept open, or while the person for whose use it was opened chose to keep it in repair. (p. 561).

"12. Section forty-four of Chapter 194 of the Acts of 1872-1873, which is taken from Section thirty-eight of Chapter forty-three of the Code of West Virginia, authorized the condemnation of lands to establish such private roads and it is therefore unconstitutional, null and void." (p. 564).

In the case of "The Salt Co. vs. Brown," 7th W. Va., page 191, which has been referred to in the previous opinions, I quote from the syllabus of the case:

"An incorporated company being the owner of coal lands desires to obtain a subterranean right of way through or under the lands of another person for the purpose of mining and removing its own coal, and applies to court for the benefit

of the 44th and 45th Sections of Chapter 43 of the Code.

"The report of the commissioners and the evidence in the case show that the company is the owner of some thirty acres of coal land from which the coal could not be mined and transported without going through the land of the defendants; that the company used said coal for the purpose of manufacturing salt at their furnaces and to sell it to the people living in and about the town of Hartford City; that the people living in and about said town could obtain coal also from other sources and that the public would not use the subterranean way set out and described in the commissioners' report through the land of the company and the company only. HELD:

"That the report and evidence did not show that the purpose for which the property is to be taken is for such public utility as that the said report could be confirmed by the court under the 45th Sec. of said 43rd Chapter of the Code."

The act under which the Salt Company claimed title is found on page 191 and 192 in the foot notes of the report in this case, and I call the Court's attention to the opinion delivered in this case and the authorities cited therein, as being the law in the State of West Virginia, as to the right of condemnation under the act of eminent domain.

The two cases and the only two cited in the supreme court of the State of Utah by the defendant in error and on which they seemed to rely largely as being in favor of their right to condemn, are the cases of "THE DAYTON GOLD AND SILVER MINING COMPANY VS. SEAWELL," 11th Nevada, 394; and "THE OVERMAN SILVER MINING COMPANY VS. CORCORAN." 15th Nevada, 147.

of this land or of other land which would answer the same general purposes, unless it was condemned. And in such case, the courts allege of the necessity for confirming such condemnation. (p. 558).

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"The report of the commissioners and the evidence in the case show that the company is the owner of some thirty acres of coal land from which the coal could not be mined and transported without going through the land of the defendants; that the company used said coal for the purpose of manufacturing salt at their furnaces and to sell it to the people living in and about the town of Hartford City; that the people living in and about said town could obtain coal also from other sources and that the public would not use the subterranean way set out and described in the commissioners' report through the land of the company and the company only. HELD:

"That the report and evidence did not show that the purpose for which the property is to be taken is for such public utility as that the said report could be confirmed by the court under the 45th Sec. of said 43rd Chapter of the Code."

The act under which the Salt Company claimed title is found on page 191 and 192 in the foot notes of the report in this case, and I call the Court's attention to the opinion delivered in this case and the authorities cited therein, as being the law in the State of West Virginia, as to the right of condemnation under the act of eminent domain.

The two cases and the only two cited in the supreme court of the State of Utah by the defendant in error and on which they seemed to rely largely as being in favor of their right to condemn, are the cases of "THE DAYTON GOLD AND SILVER MINING COMPANY VS. SEAWELL," 11th Nevada, 394; and "THE OVERMAN SILVER MINING COMPANY VS. CORCORAN," 15th Nevada, 147.

The case of the Dayton Company vs. Seawell first referred to, was an action in which the Dayton Company as petitioner, petitioned for a writ of mandamus to compel the respondent as judge of the Third Judicial District Court of that State tc proceed to hear the petition filed by the petitioner claiming that under a provision of a statute of the State of Nevada entitled, "An act to encourage the mining, milling, smelting and other reduction of ores in that State," the petitioner was desirous of acquiring a strip of land claimed by one James Waddell, to be used as a right of way for the transportation of wood, lumber, timbers, and other materials and generally to conduct and carry on the business of mining. The respondent refused to act because in his judgment the statute was unconstitutional and void. And while it is true that by the decision of the supreme court the writ was granted, a careful reading of the case will show that the strip of land sought to be condemned for road purposes was to be used for a public road, and while it was to be used by the Dayton Mining Company, it was an ordinary wagon road, constructed in the usual way of constructing such roads, and was used by the public as a public road. That all of the terms and conditions were attached to it that attach to any public road, such public roads as are discussed by Judge Dillon in the case of Bankhead vs. Brown, 25th Iowa, hereinbefore referred to (see ante). In so far as the opinion of the court is concerned, wherever it discusses what is deemed a public use to which private property can be condemned and as to how far mining interests and what mining industries are public uses, the opinion is all *dictum*,

the road being a public road that question cuts no figure in that case or this present case.

This doctrine was recognized by the same court in the case of "THE OVERMAN SILVER MINING COMPANY VS. CORCORAN," 15th Nevada, 147.

This case was tried a long time after the case of the Dayton Mining Company, yet, while the court refers to the former case and adopts it in part, the issues there were not applicable in the Overman case. In the Overman case, the Overman mine was owned by the Overman Silver Mining Company and was a part of the great Comstock Lode of the State of Nevada. The Overman Company desired to appropriate or condemn, if you please, a portion of ground lying at a considerable distance outside of its surface boundaries to sink a shaft and by means of crosscutting, to develop the mine at a great depth. The condemnation was resisted by Corcoran who claimed that he possessed a mining location valid in law and that the plaintiff company had no authority to condemn his ground. The issue was whether or not Corcoran held a valid location and the facts were found against him. That his pretended location was not a valid and subsisting location and that the premises sought to be condemned were open, unclaimed lands of the public domain, and that was the theory upon which this land case was decided. If the *dictum* in the case of Dayton vs. Seawell, 11th Nevada, had been followed in the same court in the Overman case, there would have been no necessity for determining whether Corcoran had a valid location or not because it would have been immaterial if the power of eminent domain applied to mines as announced in the *dictum* in the

Dayton case prevailed, because if that were true, it made no difference whether Corcoran was the owner of a valid claim or not; but the decision in the Dayton case did not prevail and the decision in the Overman case was based solely upon the fact that the Corcoran pretended claim was on the public land of the United States and Corcoran had no claim or possession thereto and for that reason the plaintiff prevailed. So that in neither case were the issues that are before the court in this action either tried or determined, adverse to the plaintiff in error upon the record made.

In New Jersey, in the case of "Coster vs. Tidewater Co." 18th New Jersey Equity Reports, page 54, the syllabus is as follows:

> "1. The Legislature has no power, by special act, to transfer to one man the property of another, without his consent, either with or without compensation, but upon the fact that it is not the exercise of the power of making laws, or rules of civil conduct, which is the branch of sovereign power committed to the legislature.
>
> "2. A grant of power to one man to improve the property of another without his consent, at an annual compensation to be fixed by commissioners to be appointed for that purpose, not limited to the cost of the improvement, or the interest on the cost, or the benefit received by the property, but to be fixed by the arbitrary discretion of the commissioners, is a grant to one of profit out of the land of another to the extent that such compensation may exceed the cost or interest on the cost. It therefore, is beyond the power of the legislature and void.
>
> "3. The grant to one of the power to manage and improve the property of another, without his consent, and contrary to his judgment, even if exclusively for his benefit, is an infringement

of the right of acquiring, possessing, and enjoying property, guaranteed to everyone by the Constitution.

"4. The power of eminent domain is a legislative power; these powers, by the Constitution, are vested in the legislature. Private property may be taken for public use, but only on adequate compensation.

"5. The public use for which property may be taken by the power of eminent domain, is the use of the property itself by the government, or by the general public, or some portion of it; not by particular individuals or for benefit of certain estates.

"6. Whether the use for which property is taken is a public use, is a question of law, to be settled by the judicial power. Where the use is a public use, the legislature are the sole judges of the necessity or expediency of exercising the power of eminent domain in the particular case. But it cannot evade the constitutional limitation of its power, or make a private use a public one, simply by enacting that it is such.

"7. The laws regulating partition fences, party walls, the enclosure of woodlands, the ditching and embanking of meadows, and other like police regulations, whether general or special laws, are an ancient branch of legislation. Their object is to regulate the management and enjoyment of property by the owners, or a majority of them, at their common expense, and they are a proper and constitutional exercise of legislative power."

In the opinion the learned judge, quoting from pages 62 to 65, says:

"It is now settled, beyond question, that, under a constitution like that of this State, the legislature cannot grant the property of one man to another, either with or without compensation. The only power it has is that called the

power of eminent domain vested, by necessity, in the sovereign legislative power of all governments. This is the taking of private property for public use, whenever the necessities of the government require it. This power the constitution of this State, like that of the United States and most of the states, requires shall only be exercised upon making just compensation. The condition of compensation has generally been held annexed to the right of taking private property for public use under the most arbitrary governments, in which the powers of the sovereign are not trammelled by any positive constitutional restrictions. Sinnickson vs. Johnson, 2 Harr. 129.

"There is no prohibition in the constitution of this State or in any of the state constitutions that I know of, against taking private property for private use. But the power is nowhere granted to the legislature. The constitution vests in the senate and general assembly the legislative or law-making power. They can make laws, the rules prescribed to govern our civil conduct. They are not sovereign in all things; the executive and judicial power is not vested in them. Taking the property of one man and giving it to another, is not making a law or rule of action; it is not legislation, it is simply robbery. This power was not necessary or useful to be given to the legislature for any of the purposes for which the government was instituted; and it was not given. It is the principle of all free governments, that no right of the citizen should be surrendered to the sovereign, that is not necessary for the purposes of government. This maxim prevades all republican governments as well as monarchies; for the tyranny of a majority, or of corrupt representatives, is just as oppressive, and far more odious, than that of a monarch. This is the aim of all our constitutional restrictions. The first declaration in the bill of rights, that

> forms the first article of our state constitutions, affirms that one of the inalienable rights of every man is that of acquiring, possessing and protecting property; and the last declaration therein says that such enumeration of rights shall not be construed to deny others retained by the people. This shows that the right of private property was made sacred by the constitution, to be invaded by no one, not even the legislative power, except where such control was expressly given by that instrument. Again, the sixteenth declaration of rights, which declares that private property shall not be taken for public use without just compensation, and the ninth provision, of the seventh section of the fourth article of the constitution, the article defining and restricting legislative power, which declares that individuals and private corporations shall not be authorized to take private property for public use without compensation first made to the owners, both show by inevitable implication, that it was not intended to confer on the legislature the power of taking private property for private use at all. And on this point the authorities and decisions, of which there are not a few, are uniform, without an exception."

In an early case in chancery in New York, decided in 1835, reported in "Varick vs. Smith, 5th Paige 136, the learned chancellor in his opinion, commencing on page 158, laws down a rule which has not been controverted since that day. I quote from the opinion :

> "The eighth section of the title of the Revised Statutes relative to the canals (R. S. 231), does not appear to apply to such a case. The object of that provision of the statute was to give the owner of mills adjacent to a state dam, the benefit of a head of water created at the expense of the state, so far as the water was not

wanted for state purposes; upon the payment by such mill owner, of a reasonable equivalent therefor. Such a head of water being created for the legitimate purposes of public improvement, no one has a right to tap the state dam, so as to draw off any portion of the artificial pond, without the consent of the legislature or its legally authorized agents. So far as the raising of the artificial pond, for the use of the public, has the effect, either wholly or in part, to divert the natural flow of the water from the original bed of the stream below the dam, the law has made provision for compensating those who are injured thereby. But whatever remains of the stream, beyond what is wanted for the public improvement, and which continues to flow over the dam and down the original channel of the river, unquestionably belongs to the owners of the water rights upon the margin of the stream below; in the same manner as if the state dam had not been erected. I had occasion in another case to say, that the right of eminent domain did not imply a right in the sovereign power of the state, to take the property of one citizen and transfer it to another, where the public interest would in no way be promoted by such a transfer; even if a full compensation for such property was awarded to the owner thereof. In this opinion I am fully sustained by the decision of the Supreme Court, in the recent case as to the extension of Albany Street in the City of New York. (11 Wendell Rep. 149.) The principle upon which forced sales of private property were compelled by the civil law, for the public good, were certainly as extended as any government can ever claim, consistently with the private rights of its citizens. And it is not pretended that, under the arbitrary government of the Roman Emperors, it was lawful or justifiable for the sovereign to take the property of one citizen and give it to another, where the

public interest was not concerned in such transfer. (1 Domat's Civil Law, p. 1, Tit. 2 Sec. 13.) A recent English writer, who admits the general right of the sovereign power to control or dispose of private property, paying a just compensation therefor, and to regulate and control the enjoyment of things before existing in common, considers a causeless or corrupt limitation of pre-existing rights as an abuse of the power. (Thomas' Univ. Jurisp. 171.) Perhaps in England where the power of Parliament is said to be omnipotent, so far as the exercise of mere human power is concerned, there may be no remedy for such an abuse of power, where it is by a concurrent act of the three estates of the realm. But in a state which is governed by a written constitution, like ours, if the legislature should so far forget its duty, and the natural rights of an individual, as to take his private property and transfer it to another, where there was no foundation for a pretence that the public was to be benefited thereby, I should not hesitate to declare that such an abuse of the right of eminent domain was an infringement of the spirit of the constitution; and, therefore, not within the general powers delegated by the people to the legislature."

"Donnelly vs. Decker," 58th Wisconsin, page 461.

This is an action which arose under an act of the legislature of the State of Wisconsin, which provided for the making of ditches and draining of swamps and overflowed land. The general scope of the act provided that under the provisions for draining overflowed land, supervisors of the city or township by other persons appointed, could determine what lands were to be drained, and assess the costs of said draining for the owners of the same, arrange

for the work by contract and assess the damages to be paid the owners of the land to be drained. The act was entitled, "For the Benefit of Internal Improvements." Under this act, which is fully discussed in the opinion of the court, the persons to whom the contract for draining certain lands had been awarded, entered upon the property or the complainant in the action and proceeded to excavate, dig ditches and proceed, no doubt, to fulfill the contract. The complainant brought his action under the head of "Trespass" and recovered judgment; and while this judgment was reversed in the Supreme Court, the court in an elaborate opinion, holds strongly that so far as the provisions of the act referred to would claim to be under the act of eminent domain, and that the draining of the ditches and canals was for a public benefit and public use, it decided in most emphatic terms that the act, if based upon that proposition, was unconstitutional. That the draining of the lands was for a purely private purpose and to enhance the values of individual lands of private persons. On page 468 of the opinion, we find the following:—

> "It requires but a casual examination of these provisions for the draining of the swamps and overflowed lands of the state to be apparent that such ditching and draining are for no public use whatever in the legal meaning of the term. The primary object is solely to restore such lands to a proper condition for tillage and agriculture by the several owners, and for their use alone. It enhances their value, intrinsic and in market. This is the only object which concerns their use, and that use is strictly private."

Again on page 469 the Court says:

"This legislation may readily be referred to this

> power by providing for the *public health*. If it were not for this obvious and clearly expressed purpose of the law, it could not be endured for a moment, because it would provide for a despotic and most unwarrantable interference with private property for strictly *private purposes* and *use*, in which neither the people of the state nor the state itself, nor the public, have any interest whatever."

Cases innumerable might be cited from courts all over our country adopting these views, but without caring to prolong this Brief, we call your attention to the fact that the text-writers who seem to be unanimous in their opinions and as to the distinction between a public use and a private use on the question of eminent domain and are in accordance with Judge Dillon in the case of "Bankhead vs. Brown," 25th Iowa, wherein he gives the opinion heretofore referred to.

Kent, in Volume 2, page 339 of his Commentaries, says,

> "The right of eminent domain, or inherent sovereign power, gives to the legislature the control of private property for public uses, and public uses only;" and on page 340, "But if they should take it for a purpose not of a public nature, as, if the legislature should take the property of A and give it to B, or if they should vacate a grant of property or of a franchise under the pretext of some public use or service, such case would be gross abuse of their discretion, and fraudulent attacks on private right, and the law would be clearly unconstitutional and void," and cases cited.

LEWIS ON EMINENT DOMAIN, Section 165, on pages 224 and 225 of his work, announces the following:

> "If the constitution means that private property

can be taken only for use *by* the public, it affords a definite guide to both the legislature and the courts. Though the property is vested in private individuals or corporations, the public retain certain definite rights to its use or enjoyment, and to that extent it remains under the control of the legislature. If no such rights are secured to the public, then the property is not to be taken for public use and the act of appropriation is void."

Section 167, commencing on page 228, says:

"167. Private Roads. Laws have existed, and, perhaps, do still exist in most of the states for the laying out of what are usually called *private roads*, but which are also called in some states, township, neighborhood or pent roads. These statutes have in some cases been held valid, and in others, invalid. There is, however, but little, if any, real conflict of authority, as appears when the cases are examined and compared. The key to their reconciliation is to be found in the fact that the phrase "*private road* or *private ways* is used in different states and different statutes to designate roads of entirely different character. Where the road, though laid out on the application and paid for and kept in repair by a particular individual who is especially accommodated thereby, is, in fact, a public road and for the use of all who may desire to use it, then it is regarded as accomplishing a public purpose for which land may be condemned. But when the road, after being laid out, becomes the property of the applicant, from which he may lawfully exclude the public, then the use is strictly private and the law authorizing the condemnation of the property therefor is void. In many cases the constitutional question is not raised or considered. Whether a private way is the exclusive property of the applicant or is open to

> public use must be determined from the statute. If the statute provides that it shall be for public use, or for the exclusive use of the applicant, that settles the question. If any part of the expense *may* be imposed upon the public, that circumstance would indicate that it was intended for the use of the public. Where the statute provides that the applicant shall pay the cost of the road and that it shall be for the use of himself, his heirs or assigns, it will be deemed to intend that the road shall be private property and the act will be void. Where the act provides that the road shall be laid out on the application of the individual or individuals to be benefited, who are to pay the expenses of its establishment and maintenance and gives no other indication of intent, it is generally held to provide for a strictly private road, and to be void."

To the same effect is MILLS ON EMINENT DOMAIN, 2nd Edition, Sections 23, 26, 27, and the authorities there cited.

Cooley on Constitutional Limitations, pages 651-2-3-4, holds as follows:

> "The definition given of the right of eminent domain implies that the purpose for which it may be exercised must not be a mere private purpose; and it is conceded on all hands that the legislature has no power, in any case, to take the property of one individual and pass it over to another without reference to some use to which it is to be applied for the public benefit. 'The right of eminent domain,' it has been said, 'does not imply a right in the sovereign power to take the property of one citizen and transfer it to another, even for a full compensation, where the public interest will be in no way promoted by such transfer.' It seems not to be allowable, therefore, to authorize private

> roads to be laid out across the lands of unwilling parties by an exercise of this right. The easement in such a case would be the property of him for whom it was established; and although the owner would not be deprived of the fee in the land, the beneficial use and exclusive enjoyment of his property would in greater or less degree be interfered with. Nor would it be material to inquire what quantum of interest would pass from him; it would be sufficient that some interest, the appropriation of which detracted from his right and authority, and interfered with his exclusive possession as owner had been taken against his will; and if taken for a purely private purpose, it would be unlawful. Nor could it be of importance that the public would receive incidental benefits, such as usually spring from the improvement of lands or the establishment of prosperous private enterprises; the public use implies a possession, occupation, and the enjoyment of the land by the public at large, or by public agencies; and a due protection to the rights of private property will preclude the government from seizing it in the hands of the owner, and turning it over to another on vague grounds of public benefit to spring from the more profitable use to which the latter may devote it."

Having reviewed at considerable length the decisions of the courts of the various states in which the mining interests predominate, and we think, having fairly shown by the decisions of the courts of last resort in the leading mining states of the country in cases almost exactly the same as the one now before this court, that such taking of the private property of a person for the purpose for which the defendant in error in this case seeks to condemn the property in controversy, I will refer briefly to a few of the leading cases in which the land sought to be con-

demned was condemned to be applied to other uses than mining; and will call the court's attention first to the case of the Loan Association vs. Topeka, 20th Wallace, 655.

This case was discussed at great length by this Honorable Court. Quoting from the syllabus only in regard to the power of the legislature of the state to apply the property of the individual either to condemnation or taxation to be used in the aid of enterprises whichever the legislature may deem, for a public use and a public benefit, was in fact intended for private use and private benefit and to enhance the private business of other citizens of the same or adjoining states. The court says:

> "4. There are limitations of such powers which arise out of the essential nature of all free governments; implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name.
>
> "5. Among these is the limitation of the right of taxation, that it can only be used in aid of a public object, an object which is within the purpose for which governments are established.
>
> "6. It cannot, therefore, be exercised in aid of enterprises strictly private, for the benefit of individuals, though in a remote or collateral way the local public may be benefited thereby.
>
> "7. Though the line which distinguishes the public use for which taxes may be assessed from the private use for which they may not, is not always easy to discern, yet it is the duty of the courts, where the case falls clearly within the latter class, to interpose when properly called on for the protection of the rights of the citizen, and aid to prevent his private property from being unlawfully appropriated to the use of others.

"8. A statute which authorizes a town to issue its bonds in aid of the manufacturing enterprises of individuals is void, because the taxes necessary to pay the bonds would, if collected, be a transfer of the property of individuals to aid in the projects of gain and profit of others, and not for a public use in the proper sense of that term."

This case was cited and forms a large portion of the opinion in the case of The Consolidated Channel Company vs. the V. P. R. R. Company, 51st Cala. 269, cited in the early part of this brief.

In the matter of the application of the Eureka Basin and Warehouse Manufacturing Company, to acquire title to lands, 96 New York, 42.

This case came before the Court of Appeals in the State of New York on appeal from the General Term of the Supreme Court affirming an order appointing commissioners to ascertain the compensation to be allowed for the lands of John Peters, sought to be condemned.

It appears that the petitioner was organized as a corporation by filing a certificate of incorporation under an act of the Legislature of the State of New York authorizing the formation of corporations for manufacturing, mining, mechanical and chemical purposes. The object for which the company was formed was declared by its articles of incorporation to acquire by gift, purchase or otherwise certain marshes, swamps and other lands which were particularly described in the certificate and to excavate and construct and maintain basins, docks, wharves and piers, and to erect thereon suitable warehouses, mills, foundries, factories, shops and other buildings as might be necessary and proper for the docking, unloading and

the storing of goods and for the carrying on the general business of a dock, warehouse and manufacturing company and in every other proper and suitable way promoting and increasing the business of commerce and manufacture and business generally. The act was then limited in certain respects and also provided the manner in which property necessary for the carrying on of its business was to be acquired. On page 47 of the opinion we find a further provision which is as follows:—

> "In case the company shall be unable, after reasonable diligence, to ascertain who are the owners of any of said lands and premises, or shall be unable to agree with such owner or owners as to the price or sum to be paid therefor or for the purchase thereof, then the same and the title thereto may be acquired by the special proceedings prescribed by law for acquiring title to lands for railroad purposes, and said company shall have the right to issue its corporate bonds secured by mortgage, and to sell and dispose of the same from time to time for the purposes of its organization. This act is hereby declared to be a public act, and the basis of said company shall at all times be be open to public use for all vessels that may apply therefor, and said company shall commence operations within one year from the passage of this act and expend thereon not less than ten per centum of its capital."

Upon this state of facts and under the provisions of the act last above referred to, the court says:

> "If this were all of the act it would appear that the basin and wharves proposed to be constructed by the company were intended to be open to the public use, and that the only part of the enterprise which remained private was that relating to the construction of warehouses,

mills, furnaces, factories, etc., and the case has been discussed by counsel on both sides as if the only question in the case was whether the purposes last mentioned, being private, and the basin and wharves being public, the delegation to the company of the right of eminent domain was justified. That, however, is far from being the only question, or the real question, for the act contains a very important proviso which gives quite a different complexion to the enterprise, but which, for some unexplained reason, has not been referred to by counsel on either side, although this court expressly directed the case to be reargued on the question whether it was a proper one for the exercise by the corporation of the right of eminent domain.

"This proviso immediately follows the last quoted portion of the act of 1881, and is in the following words: 'Provided, however, that the provisions of this act shall not apply to any part of said basin lying west of First street, between North Thirteenth street and Bushwick Creek, nor to any parts lying west of Third and south of North Thirteenth street, or east of Third and south of a line drawn midway between North Ninth and North Tenth streets; nor to any part thereof lying west of the easterly line of Franklin street and between the northerly line of Quay street and the northerly bulk-head line of Bushwick Creek; nor to any part thereof lying north of the southerly line of North Fifteenth street and of a line drawn in continuation thereof in an easterly direction.'

"No map has been furnished to direct the attention of the court to the extent of the premises thus reserved from public use, but on reference to the map of the city of Brooklyn it will be found that the lands thus reserved embrace the property available for wharves on the southerly and northerly sides of the contemplated basin from its junction with the East river to near

the rear of the basin, and also much the larger part of the area of the proposed basin, leaving open to the public simply the means of entrance and a comparatively small area in the center of the basin, so that, if constructed and wharfed as proposed, in the certificate of incorporation, the surrounding wharves and warehouses would be the private property of the corporation, and the public would have no rights therein. The wharves will not even have the character of wharves on public navigable waters, but will be on an artificial basis constructed on private property, and it would be extremely difficult to determine what parts of the basin were in fact open to the public.

"We cannot regard such a project as a public purpose or use which justifies the delegation to this company of the right of eminent domain. The enterprise is, in substance, a private one, and the pretense that it is for a public purpose is merely colorable and illusory. The taking of private property for private purposes cannot be authorized even by legislative act, and the fact that the use to which the property is intended to be put, or the structure intended to be built thereon, will tend incidentally to benefit the public by affording additional accommodations for business, commerce or manufactures, is not sufficient to bring the case within the operation of the right of eminent domain, so long as the structures are to remain under private ownership and control, and no right to their use or to direct their management is conferred upon the public."

I have called attention to but a few of the many cases bearing upon the subject which hold uniformly with the authorities which I have cited. They are found from New York to California in states spanning the entire continent. Text writers are equally as unanimous. Under all rules and principles of justice and equity we claim that the

exercise of eminent domain over defendants' property is unlawful, unjust and unconstitutional.

AS TO THE RIGHTS AND GRANTS CONVEYED BY PATENT TO MINING LOCATIONS.

Under the Act of Congress of February 27th, 1865, and the Act of July 4th, 1866, in regard to mineral lands and mining resources, the locator of a mining claim was entitled to two hundred feet in length with the width as provided in local laws; and under the laws mentioned the locator had the right to follow the vein or lode wherever it went irrespective of surface boundaries, and there was no law prohibiting any other prospector or mine owner from entering upon the surface of an adjacent mining claim, already located or patented, and prospecting for mineral on the same; but under the Act of Congress of May 10th, 1872, entitled, "Mineral Lands and Mining Resources," the discoverer of a mineral vein, either by himself or with his associates, was entitled to locate fifteen hundred feet in length on the vein, and under an amendment to said law, an area six hundred feet in width, of a quartz claim; and at the time of the location and discovery of the Argonaut No. 1 Placer Mining Claim, a placer claim was governed by the local rules and regulations of the mining district in which it was situated. Under the local laws on West Mountain Mining District, the district in which the Argonaut No. 1 Placer Mining Claim was situated, there were three classes of placer claims: the Gulch, the Bar and the Hill. The Gulch claim extended from rim to rom of the Gulch; the Bar claim extended from the rim of the Gulch to the rim of the Bar; and the Hill claim ex-

tended from the rim of the Bar, which is equivalent to the base of the mountain, to the summit of the mountain. The Argonaut No. 1 Placer mining claim was what is known as a Hill claim, and was located with metes and bounds as described in the patent therefor.

Section 2322 of the Act of Congress last cited, provides:

> "The locators of all mining locations heretofore made or which shall hereafter be made, on any mineral vein, lode or ledge, situated on the public domain, their heirs and assigns, where no adverse claim exists on the tenth day of May, 1872, so long as they comply with the laws of the United States, and with the State, Territorial and local regulations not in conflict with the laws of the United States, governing their possessory title, shall have the exclusive right of possession of all of the surface included within the boundaries of their locations and all veins, lodes and ledges on their claim for their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically."

Section 2325 of said Act provides for the manner in which proceedings are instituted from which patents from the Government issue to mining claims.

Section 2329 provides:

> "Claims usually called 'placers,' including all forms of deposit, excepting veins of quartz, or other rock in place, shall be subject to entry and patent, under like circumstances and conditions, and upon similar proceedings as are provided for vein or lode claims; but where the lands have been previously surveyed by the United States, the entry in its exterior limits shall conform to the legal subdivisions of the public lands."

So that, under the location and patent of the Argonaut No. 1 Placer mining claim by virtue of the Act of Congress and the grant from the Government of the United States included within the patent therefor, the owners of the Argonaut No. 1 Placer mining claim, under the provisions of the law quoted, had the exclusive right and possession of all of the surface ground included within the boundaries of the claim as described in the patent, and no legislature or court, either under the act of eminent domain or any other act, except for a public purpose or use clearly recognized by law, had the right to take the possession of the Argonaut No. 1 Placer mining claim, either the surface or under the surface, from the owners and give it to the defendant in error for the more convenient working of its own mines.

We take it that under all of the authorities cited, no legislature or court, either under the pretense of the act of eminent domain, or for whatever purpose the legislature may enact, or whatever rule the court may adopt, have the authority to take property from A and give it to B, when it is as apparent as it is in this case that the only object that can be accomplished by such transfer is to enable B to more successfully conduct the same business that A is conducting, and to condemn A's property to the use of B for the same purposes for which A has already appropriated it, and especially is this so where the only benefit to be derived is that B may more successfully, economically and conveniently conduct its mining enterprises.

The following provisions of the statutes of Utah apply to proceedngs in condemnation. From this it will be seen that the right of the legislature to determine whether

or not the property sought to be condemned is for a public or a private use was to be determined by the courts.

Under Chapter 65 of the Compiled Laws of the State of Utah of 1898, commencing on page 794 and continuing to the end of the chapter.

Section 3591, page 796, provides:

"3591. Conditions precedent to condemnation. Before property can be taken, it must appear:
"1. That the use to which it is to be applied is a use authorized by law.
"2. That the taking is necessary to such use.
"3. If already appropriated to some public use, that the public use to which it is to be applied is a more necessary public use."

Section 3596, page 796, provides:

"3596. Power of the Court. The court or judge thereof shall have power:
"1. To determine the conditions specified in section thirty-five hundred and ninety-one; to determine the places of making connections and crossings, and to regulate the manner thereof; and of enjoying the common use mentioned in the fifth subdivision of section thirty-five hundred and ninety.
"2. To hear and determine all adverse or conflicting claims to the property sought to be condemned, and to the damages therefor.
"3. To determine the respective rights of different parties seeking condemnation of the same property."

Section 3606, page 799, provides:

"3606. Procedure Applicable. Except as otherwise provided in this chapter, the provisions of this code relative to civil actions, new trials, and appeals, shall be applicable to and constitute the rules of practice in the proceedings in this chapter."

So that, while the Legislature of the State of Utah have attempted to legislate away the rights of mine owners that ought to be protected, the same are still under the control of the courts, and this court has the right to review the decision of the supreme court of the State of Utah, and determine whether or not the taking of plaintiff in error's property was in violation of the 14th Amendmentment to the Constitution of the United States and of the fundamental principle that no man can be deprived of his property without due process of law. In this view of the case Head vs. Amoskeog, 113 U. S. 51, or the more recent case of Fisher vs. Harris, 24th Utah, 506, lately affirmed by this Honorable Court and decided, October term, 1904, but not yet officially reported, will not be found applicable.

Respectfully submitted,

ARTHUR BROWN,

FRANK HOFFMAN.

Attorneys for Plaintiffs in Error.

FILE COPY.

Supreme Court of the United States

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Clerk.

OCTOBER TERM, 1905.

No. 172

JOHN STRICKLEY AND ELLEN STRICKLEY,
PLAINTIFFS IN ERROR,

v.

THE HIGHLAND BOY GOLD MINING COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF UTAH.

Brief and Argument of Defendant in Error.

GEORGE SUTHERLAND,
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Attorneys for Defendants in Error.

(19,620.)

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STATEMENT OF FACTS.

The Highland Boy Gold Mining Company, a corporation, defendant in error, brought this action in the Third Judicial District Court of Utah, Salt Lake County, against the plaintiffs in error as husband and wife, to condemn for public use a narrow easement, area about half an acre, for an aerial tramway across a barren surface, consisting of an unimproved mining claim, called

the Argaunaut, situated on a steep mountain side in Bingham Canyon, Salt Lake County, Utah.

The trial court gave a temporary order of occupation on the filing of the proper bond, and later, on the trial, granted to the company the right to condemn, and made findings of fact, conclusions of law, and interlocutory decree; thereupon, a jury was empaneled and a verdict was rendered for plaintiffs in error finding the right of way to be worth one hundred dollars and interest on the same since the beginning of the action, amounting to $17.60, and finding no damages to the remaining part of the mining claim. The amount of the judgment was paid into court and thereupon a final order of condemnation was made transferring the title, as prayed for by the defendant in error.

The plaintiffs in error appealed to the Supreme Court of Utah and there the decree of the lower court was affirmed. (78 *Pac. Rep.* 296, *Highland Boy Gold Mining Company v. Strickley.*) Thereupon the plaintiffs in error brought the case to this court.

The statutory provisions authorizing condemnation are the *Revised Statutes of Utah*, 1898, *Section* 3588, (6), as amended by the *Session Laws of Utah*, 1901, *page* 19, to-wit:

"3588. Subject to the provisions of this chapter, the right of eminent domain may be exercised in behalf of the following public uses:

* * * * * * *

"6. * * * tramways, * * * to facilitate the milling, smelting, or other reduction of ores, or the working of mines; * * *."

IN DETAIL THE FACTS ARE:

The complaint of the defendant in error (Rec., 1-5) shows that the mining company is a corporation organized under the laws of New Jersey and doing busi-

ness in the State of Utah. By its articles of incorporation, it was organized and authorized to construct, maintain, and operate aerial tramways for the transportation of ores, materials and things generally used in and about the operation of mines and it was further authorized to acquire, construct, maintain, and operate an aerial tramway from its mining properties situated in West Mountain Mining District, Salt Lake County, Utah, in an easterly direction to the depot of The Rio Grande Western Railway Company, situated in Bingham Canyon in said mining district. And the complaint further shows that said mining company theretofore had constructed and operated such aerial tramway for the uses and purposes aforesaid; that the plaintiffs in error were husband and wife and the owners and claimants of the Argaunaut mining claim; that the aerial tramway extends from the mining company's mines at the head of Bingham Canyon in an easterly direction for about two and one-half miles to the depot of said railway company; that the mining claim had not been taken for any public use and that it was necessary to cross the same with such aerial tramway; that the right sought to be condemned was 25 feet in width and the total area taken amounted to .551 acres. A map of the Argaunaut mining claim and of part of the aerial tramway is shown on page 5 of the record.

The *Revised Statutes of Utah*, 1898 *Section* 3597, provide:

"The plaintiff may move the court or a judge thereof, at any time after the commencement of suit, * * * for an order permitting the plaintiff to occupy the premises sought to be condemned, pending the action, * * *. The court * * * shall take proof * * * of the value of the premises sought to be con-

demned * * * and of the reasons for requiring a speedy occupation, and shall grant or refuse the motion according to the equity of the case and the relative damages which may accrue to the parties. If the motion is granted, the court or judge shall require the plaintiff to execute and file in court a bond to the defendant, * * *."

The trial court, under the above statute, granted the mining company a temporary order of occupation.

The amended answer of the plaintiffs in error appears in the Record, 9-12. On page 10 of the Record the plaintiffs in error allege:

"That the taking of defendant's said ground by the plaintiffs and the use and occupation thereof for such private use and benefit is contrary to the provisions of the 14th amendment to the Constitution of the United States, and is unauthorized by law."

The court without a jury, first determined whether the mining company was entitled to condemn the easement in question. In the *Revised Statutes of Utah*, 1898, it is provided:

"Section 3591. Before property can be taken it must appear:

"1. That the use to which it is to be applied is a use authorized by law.

"2. That the taking is necessary to such use.

* * * * * * *

Section 3596 of the same statute provides:

"The court or judge thereof shall have power:

"1. To determine the conditions specified in section thirty-five hundred and ninety-one; * * *."

The court heard evidence on the preliminary question of the mining company's right to condemn the easement and made findings of fact, conclusions of law and interlocutory decree. (See Rec. 16-19.)

In paragraph one of the findings, the court found that

the mining company is a corporation, as alleged, and was organized and *authorized to acquire, construct, maintain and operate an aerial tramway* for the transportation of ores, materials, and things generally used in and about the operation of mines, and that such mining company is authorized to acquire, construct, maintain, and operate an aerial tramway from its mining properties in West Mountain Mining District, Salt Lake County, Utah, to the depot of the Rio Grande Western Railway Company, in Bingham Canyon, and that the mining company in 1898 and 1899 had constructed such tramway from its mines to the said depot and had been and was then operating such aerial tramway for such uses and purposes.

In paragraph two, it is found that the mining properties owned by the mining company are situated quite high up in Bingham Canyon and at a considerable distance above the railway depot, and that for all practical purposes the tramway answers the purpose of, and is used as, a railway for the transportation of ore, coal, material, and things generally used in and about the operation of mines, and that the tramway is used to facilitate the milling, smelting and reduction of ores and the working of mines, and that the mining company is a carrier for itself and others.

In paragraph three the court found that the mining company, before constructing its tramway, made diligent inquiry to ascertain the owner of the Argaunaut mining claim, and although the same was patented, yet the patent had not been recorded, and that the plaintiff in error, John Strickley, with knowledge, stood by without objection or making his rights known, while the mining company erected and constructed its tramway over such mining claim.

In paragraph four it is found that the plaintiffs in error are husband and wife and the owners and claimants of the Argaunaut mining claim.

In paragraph five it is found that the mining company desires to operate such aerial tramway from its mines near the head of Bingham Canyon, in an easterly direction, for about two and one-half miles, and ending at such railway depot.

In paragraph six it is found that the width of the easement sought is twenty-five feet, and that the total area taken is .551 acres, and that the right of way for the length and width mentioned is necessary for the operation of said aerial tramway.

In paragraph seven it is found that the taking of the easement is necessary to the use of the mining company and is not appropriated to any other public use.

In paragraph eight it is found that the mining company requires four towers on the Argaunaut mining claim for the operation of such tramway; that each tower is seven and one-half feet square at the base; that cables connect such four towers, and that the mining company only requires such use of the surface of the mining claim as will support such four towers, together with the overhead cables and the right occasionally to drive along by the towers with team and wagon to make repairs; that the mining company is to remove such towers at any time to different points on such easement, at its own expense, when reasonably required by the owners of the mining claim; and that the use of such surface by the mining company is entirely consistent with the use of such claim by the owners for mining and working the same.

The court then made its conclusions of law, as appears in the Record, p. 18, and an interlocutory decree

was then entered, as appears on page 19. The interlocutory decree follows the findings of fact and conclusions of law. (Rec., 19.)

A jury was then impaneled and it returned a verdict as aforesaid, finding the value of the easement to be one hundred dollars, and the damages to the remaining part of the claim nothing. The mining company paid into court the amount assessed and thereupon the court made its final order of condemnation, as provided in the *Revised Statutes of Utah, Section* 3603. The final order of condemnation appears in the Record, 20-1. This final order follows the findings of fact, conclusions of law, and interlocutory decree above referred to.

The parties to this record entered into a stipulation as to what should be printed in this record, and the following is a part as appears in the Record, 37-8:

"The mines of the plaintiff are situate near the head of Carr Fork, Bingham Canyon, which is about two miles above the town of Bingham, and in altitude about 1,200 feet. The town of Bingham is about 1,500 feet above the valley. The tramway extends from the plaintiff's mines to the town of Bingham, a distance of about two miles. The tramway consists of two cables, supported on wooden towers. The towers are spaced at irregular intervals and in some cases about a thousand feet apart, depending upon the contour of the ground, so as to pass over the valleys and deep gullies and to get over the ridges. A tramway cannot run in a curved line, it must be straight. The Argonaut mining claim is situate on a mountain side. There is some small brush on it, but no timber. Bingham Canyon is almost entirely devoted to mining."

THE PLAINTIFFS IN ERROR HAVE INTRUDED SOME MATTERS INTO THE RECORD WHICH PROPERLY DO NOT BELONG THERE,

AS APPEARS ON PAGES 6 AND 12-15, AND TO AVOID CONFUSION IT IS NECESSARY TO EXPLAIN THE MEANING OF THESE REFERENCES.

The plaintiffs in error, some time before the commencement of the present action, commenced an action in said trial court against the mining company to eject it from the Argaunaut mining claim, as such mining company was then operating its aerial tramway. The mining company removed the case to the Federal Court for the District of Utah; and in its answer filed a cross complaint in effect asking to condemn an easement across the Argaunaut mining claim for its aerial tramway. Still later the mining company amended its cross complaint so that it did not ask for any condemnation, but merely prayed that permanent damages be assessed. A verdict for the plaintiffs in error was directed in the Federal Court. The mining company then appealed to the Circuit Court of Appeals for the Eighth Circuit, and the judgment of the lower court was affirmed. The opinion in that case appears in 116 *Fed.* 852, *Highland Boy Gold Mining Company v. Strickley.* After such affirmance, the mining company commenced this action in the State court and obtained a temporary order of occupation, and on the filing of the remittur from the Circuit Court of Appeals, the mining company moved the Federal Court for an order staying the writ of restitution until the case at bar was finally adjudicated, and later the order was made accordingly. Thereupon the plaintiff in error, John Strickley, applied to the Circuit Court of Appeals for the Eighth Circuit for a writ of mandamus against the Federal Judge for the District of Utah to compel him to issue the writ of restitution. This was denied. This case is *reported in* 122 *Fed.* 428, *United States ex rel Strickley, v. Marshall, Judge, et al.*

ARGUMENT AND AUTHORITIES.

The plaintiffs in error have not brought up all the evidence. Nor did the plaintiffs in error take any exceptions that this court can review. In particular the plaintiffs in error made no objection nor took any exception raising any constitutional question. The trial court found as to the powers of the mining company as contained in its articles of incorporation, but the plaintiffs in error have not brought up these articles of incorporation.

POINT I.

This Court should not consider whether the Action of the trial court is in contravention of any provision of the Fourteenth Amendment to the Constitution of the United States, Because no such claim was either "Specially set up or claimed."

In the *Revised Statutes of the United States, Section* 709, it is provided in substance that the claim that the law is opposed to the Constitution of the United States must be "specially set up or claimed" in order to be reexamined, reversed or affirmed.

In Rule 21 of this court, it is provided in substance that the plaintiff in error shall set out separately and particularly each error asserted and intended to be urged.

In this case in the trial court, the plaintiffs in error made no objection and took no exception that raised any constitutional question. The only place in which they in any way hinted at any such question is contained in

their amended answer, as appears on page 10 of the record, to-wit:

"That the taking of defendant's said ground by the plaintiffs and the use and occupation thereof for such private use and benefit is contrary to the provisions of the 14th amendment to the Constitution of the United States, and is unauthorized by law."

The defendant in error now asserts that the constitutional question is not "specially set up or claimed." It is certain that the action of the trial court, even if wrong, is not contrary to *all the provisions* of the Fourteenth Amendment to the Constitution of the United States as alleged by plaintiffs in error.

Therefore, in order for them to be heard, it is necessary that, at the proper time, they should have "specially set up or claimed" the particular point on which they rely. The same is required by rule 21 of this court. There are many provisions in the Fourteenth Amendment and it is necessary to comply with *Section* 709 of the *Revised Statutes* and to make a particular specification or statement of *the point* relied upon.

In *Morrison v. Watson*, 154 *U.S.* 115, Mr. Justice Gray delivering the opinion, it is said:

"In order to give this court jurisdiction of a writ of error to review a judgment of the highest court of a State, on the ground that it decided against a title, right, privilege, or immunity claimed under the Constitution or a treaty or statute of the United States, such title, right, privilege, or immunity must have been 'specially set up or claimed' at the proper time and in the proper way. If it was not claimed in the trial court, and therefore, by the law and practice of the State, as declared by its highest court, could not be considered by that court; or if it was not claimed in any form before judgment in the highest court of the State; it cannot be asserted in this court. Rev. Stat. U. S., Sec. 709; *Spies v. Illinois*,

123 U. S. 131, 181; *Brooks v. Missouri*, 124 U. S. 394; *Chappell v. Bradshaw*, 128 U. S. 132, 134; *Brown v. Massachusetts*, 144 U. S. 573; *Schuyler National Bank v. Bollong*, 150 U. S. 85; *Miller v. Texas*, 153 U. S. 535."

In *Spies v. Illinois*, 123 *U. S.* 181, it is said:

"To give us jurisdiction under Sec. 709 of the Revised Statutes because of the denial by a State court of any title, right, privilege or immunity claimed under the Constitution, or any treaty or statute of the United States, it must appear on the record that such title, right, privilege or immunity was 'specially set up or claimed' at the proper time in the proper way. To be reviewable here the decision must be against the right so *set up or claimed*."

In *Bolln v. Nebraska*, 176 *U. S.* 90-1, is a discussion of this particular question, and on page 91-2 it is said:

"Upon this state of the record we are unable to say that the decision of the court below was against a title, right, privilege or immunity, specially set up or claimed by either party, under the Constitution of the United States.

"We have repeatedly decided that an appeal to the jurisdiction of this court must not be a mere afterthought, and that if any right, privilege or immunity is asserted under the Constitution or laws of the United States it must be specially set up and claimed before the final adjudication of the case in the court from which the appeal is sought to be maintained. It is true that this court has sometimes held that, if a Federal question appear in the record and was decided, or such decision was necessarily involved in the case, and that such case could not have been determined without deciding such question, the fact that it was not specially set up and claimed is not conclusive against a review here; but such cases have usually, if not always, arisen under the first or second clauses of section 709, and have involved the validity of a treaty, statute or au-

thority exercised under the United States, or the validity of a statute or authority exercised under a State, where such statute or authority is alleged to be repugnant to the Constitution or the laws of the United States. *Columbia Water Power Co. v. Columbia Street Railway &c. Co.*, 172 U. S., 475. In the case under consideration the right to a trial by jury is claimed under the Constitution of the United States; but as it was never set up or claimed prior to the decision of the Supreme Court of the State, it is too late to raise the question here."

The Supreme Court of Utah, in deciding this case, 78 *Pacific Reporter*, 297, says:

"Appellants (defendants below) contend that the foregoing provision of the statute is in conflict with Section 22, Art. 1, Const. Utah, which provides that 'private property shall not be taken or damaged for public use without just compensation,' for the reason that the use made of the right of way sought to be condemned is not a public use."

The plaintiffs in error in their assignment of errors in this court say that the court below erred in the following particular, [among others] (Rec., 32), to-wit:

"1st. That the use to which the defendant in error was seeking to condemn the property of the plaintiff in error was a public use as defined by the 14th amendment to the Constitution of the United States."

It is respectfully submitted that the assignment of error in this court is not sufficient to comply with *Section* 709 *of the Revised Statutes of the United States*, nor is it sufficient under Rule 21 of this court. The decision of the Supreme Court of Utah shows that it was a mere "afterthought" on the part of the plaintiffs in error to contend that the action of the trial court was in contravention of a *specific provision* or of all the provisions, of the Constitution of the United States.

POINT II.

The Aerial Tramway of the Defendant in Error is a Public Use, and It is So Used.

In order to determine whether a particular use is a public one, it is first necessary to ascertain whether such use furthers the general public policy of the State and contributes to the public welfare. A brief description of the natural configuration of the State will be helpful.

Utah is an arid State, crossed by great mountain ranges. Long narrow valleys lie between these ranges. The impossibility of growing general agricultural crops or of supporting any considerable population, without artificial irrigation, is therefore, apparent. And farther the deep ravines, high mountains, and sloping benches make it necessary that irrigation ditches shall be constructed in certain favorable places in order to irrigate tillable land.

These mountain ranges contain vast mineral deposits, the mineral-bearing belts usually lying high in the mountains. Natural conditions are such that this State could not live or prosper without developing this resource. To a great extent these immense mineral deposits compensate for the absence of the great forests and the abundant water-courses in which some parts of the United States are so rich. The high mountains in Utah necessarily mean narrow canyons, deep gullies, and precipitous ridges, and in order to carry on properly the mining industry it is necessary, as a matter of public policy that the legislature should devise and furnish means of advancing the public good by giving every reasonable advantage and facility for the development of Utah's mineral resources. The

high mountains, precipitous ridges, and deep gullies make it financially impossible for mines to be furnished with railway facilities for the transportation of their ores and mining supplies. No railway company could afford to build a road to the different mining properties under the conditions named. A railway probably might be built for a particularly large or rich group of mines, but as mines are found all over the State and are frequently situated high in the mountains it is a necessity that some other means of transportation shall be devised than that by railroad.

But it is practicable and within the means of mining and transportation companies to construct aerial tramways.

Briefly, the construction of such tramways is as follows: Towers, practically 7½ feet square at the base, and tapering upward, and from 10 to 30 feet in height, are erected in a straight line at suitable intervals along the route, this interval varying with the contour of the country, but sometimes being as much as 1000 or 1500 feet where a gully is to be crossed. Practically the only limitations upon the location of the towers are that they must be situated on solid ground and in a straight line. Movable cables run over pulleys at the sides of the towers, down one side of the towers and back by the other, thus making an endless cable, which bears laden buckets from the mines to the terminus of the tramway—probably a railroad station—and returns the empty buckets to the mine. Each bucket is capable of a load of about 700 pounds. In this case the cable reaches a distance of about two and a half miles from the mines of the defendant in error to the railway depot. And thus the mineral products and general mining supplies are carried over these cables

and aerial tramway. It would bankrupt the richest railway company in the world to bridge these deep gullies and to do the excavating that would be necessary to go over or through the immense ridges, particularly when the fact of the limited supply of ore that would be furnished by each mine is taken into consideration. On the other hand, these aerial tramways *in fact* take the place of railways for these isolated mines throughout the State of Utah. In the first place, such aerial tramways are within the means of transportation and mining companies, considering the amount of ore and mineral to be transported within a certain locality. In the second place, such mines could not be developed if the great cost, either of building a railway or of transporting everything by wagon had to be incurred. Therefore, these mining properties can only be developed by providing for the construction of aerial tramways. The record shows that such tramways must run in a straight line, it not being feasible to operate them either on angles or sharp curves. As there are always people who are unwilling to part with property for a reasonable price, it becomes necessary either that mining and transportation companies shall have the right of eminent domain for aerial tramways or that our great mineral resources shall go undeveloped. Utah is not like the East, where the country is comparatively flat and where there is a choice of many routes. The mountains, canyons, ridges, and gullies make it necessary that certain ways *only* shall be chosen for the construction of tramway lines. As water specially directed in irrigation ditches is necessary in this State to raise agricultural crops, so aerial tramways are of as vital necessity for the purpose of producing and putting into circulation

the mineral wealth that abounds so liberally in these great mountain chains.

In the Record (37-8) it appears that the mines of the defendant in error are situated near the head of Bingham Canyon. The mines and the railway depot at Bingham are about two miles apart, but in those two miles there is a rise in altitude of about 1200 feet, and the town of Bingham is about 1500 feet above the Salt Lake valley. The Argaunaut mining claim is situated on a mountain side and a little brush grows on it, but no timber. The defendant in error has placed four towers upon this claim. Three of the towers are within a space 150 feet in length, while the fourth is about 350 feet distant from the others.

If Utah is to prosper, it must recognize as its public policy the development and advancement of its irrigation and mineral resources. To do otherwise would be suicidal. These uses are as public, from the standpoint of *its* public policy and general welfare, as is the public use in other States of our Union for railroads, for log booms, for public buildings, for wharves, and for all of the other public uses generally recognized by legislatures and courts. And our legislature has formally recognized these two great resources as public uses.

Our statute on this subject is so important that we quote the particular section. See session laws of Utah, 1896, page 316, Sec. 1, to-wit:

"The cultivation and irrigation of the soil, the production and reduction of ores, are of vital necessity to the people of the State of Utah; are pursuits in which all are interested and from which all derive a benefit: and the use and application of the unappropriated waters of the natural streams and water courses of the State to the generation of electrical force or

energy to be employed in industrial pursuits are of great public benefit and utility. So irrigation of land, the mining, milling, smelting or other reduction of ores, and such use and application of such waters for the generation of electrical power to be employed as aforesaid are hereby declared to be for the public use, and the right of eminent domain may be exercised in behalf thereof."

This declaration was made by the Utah legislature in 1896, and was copied from a provision enacted theretofore by the legislature of Nevada. (See General Statutes of Nevada, 1885, Section 256 et seq.)

This honorable court, in a case from Utah, decided May 15, 1905, has decided that under the public policy of this State the right to enlarge an irrigation ditch for the purpose of conveying water across the land of plaintiffs in error for the use of defendant in error is a public use.

See 198 U. S., 361, Clark v. Nash.

The Supreme Court of Utah held similarly in the same case.

See 27 Utah 158, Nash v. Clark.

One of the great public uses of Utah, namely, irrigation, has been judicially declared to be a public use. No less important to the public policy and general welfare of the State of Utah is the development of its mineral resources. The legislature of Utah has declared in emphatic terms the great public necessity of developing the mineral wealth of the State. The legislature has declared that it is a public use to construct aerial tramways for the development of its mineral resources. The District Court and the Supreme Court of Utah have declared in this case that under the statute so providing the construction of aerial tramways for the development of mineral resources is a public use.

See 78 Pac. 296, Highland Boy Gold Mining Co. v. Strickley.

IN A GENERAL WAY IT HAS HERETOFORE BEEN MENTIONED WHY AERIAL TRAMWAYS SHOULD BE DECLARED A PUBLIC USE, BUT WE STATE MORE AT LENGTH THE REASONS FOR SO HOLDING:

A tramway is used for the transportation of ore, coal, and other materials necessary to the development of mines and of the mining industry in this State. Plaintiffs in error contend that because a tramway transports freight through the air instead of on the surface of the ground that this makes such a difference that while a railway is a public use a tramway is not. Plaintiffs in error do not claim that a railway is not a public use. At this time they could not so contend. Our legislature has recognized that the transportation of freight, ores, and materials through the air is as much a public use as is the transportation of such materials in railway cars on the surface of the earth. The manner of transportation in the two cases is different; transportation along the surface of the ground is impracticable for the development of many mines and of the mineral resources of this State, particularly where such mines are situated on high ridges or near the tops of mountains, or in such isolated localities that it is not practicable to construct steam railways to them. In such cases it is necessary that transportation shall be by some method that is practicable—and that is by aerial tramways. While the means of transportation in such cases is different, yet the result is the same; in one case, there is a transportation on the surface of the earth, and in the other, through the air.

Great weight should be given to the legislative

declaration of what is a public use. Many courts hold that the legislative declaration is conclusive. (See 41 Cal. 168-9, 175, Stockton etc. Co. v. City of Stockton.) The great weight of authority, as well as of reason, is to the effect that the legislative declaration is to be given great weight, but is not conclusive on the question of public use. The first inquiry is, what is a public use? Public uses change from time to time, as is well illustrated and stated in 41 Cal. 168, Stockton etc. Co. v. City of Stockton. One hundred years ago, a railroad was not a public use, and probably was not known; the same might be said of the telephone, the telegraph, the electric light, and many other modern inventions. So what is a public use constantly changes according to inventions and according to the needs of the public, and especially according to those needs in different localities. It can be easily imagined that a new invention to-day might not be held a public use, but that it might develop so rapidly that within six months all courts would unhesitatingly hold that the use was public. So that the question of what is a public use changes according to our needs and wants. In the same way, public use depends very much on locality and circumstances. There was a time when eminent domain could not be exercised for manufacturing mills and log booms; but in the New England States where water power is very much in demand, and where it is desirable to overflow lands by backing water to get a large flow, the courts hold, and the public demands, that these mills should be recognized as a public use and should have the right to exercise the power of eminent domain for the purpose of condemning land for flooding purposes. Manufacturing in New England is of no more importance to that locality than is

the development of the mining industry in Utah and in other States similarly situated, nor is it more of a public use than is irrigation in the arid region. If manufacturing is necessary to the public welfare in New England, it is no more so than are mining and irrigation in Utah. So it is held that it is a public use to establish log booms; it might be held that a log boom was not a public use in Utah, because there is not sufficient timber here to justify such holding. The same might be held in Nevada, and yet exactly the opposite doctrine might prevail in Michigan, Wisconsin, Minnesota, and other States where there are large timber belts. It can well be imagined that mining is a public use in Nevada, Utah, Montana, Colorado, and other Western States, and yet that mining would not be a public use in Florida, Louisiana, and other States where there is little mineral.

So in New York and Ohio, it would be held that the construction and operation of irrigation ditches was not a public use, and yet the contrary would reasonably be held, and has been held, in Utah and other arid Western States. So what is a public use depends very greatly on the locality, and as public use is the equivalent of "public benefit," "public policy" and "public purpose," it may be seen that while in one State the development of an industry is a public use, in another State the same industry is not. So, cases in different States in which it is held that the development of mines is or is not a public use, are not pertinent to the question unless conditions in the States in question approximate to those in Utah.

It is impracticable to construct a railway from the town of Bingham to the mines of the defendant in error because the grade is such that cars could not be

controlled; but it is practicable to construct an aerial tramway which answers the purpose of a railway; and because the transportation is through the air instead of on the ground can make, and should make, no essential difference as to the public utility. In 94 U. S. 132-3, the court says:

"For our purposes we must assume that, if a state of facts could exist that would justify such legislation, it actually did exist when the statute now under consideration was passed. For us the question is one of power, not of expediency. If no state of circumstances could exist to justify such a statute, then we may declare this one void, because in excess of the legislative power of the State. But if it could, we must presume it did. Of the propriety of legislative interference within the scope of legislative power, the legislature is the exclusive judge."

Applying the above test to the case at bar, what is the result?

Utah is mountainous, and its mountains contain great mineral wealth. The contour of the country, of the mountains, of the deep canyons, of the great ridges, of the rocky barriers, of the steep grades, is such that the ordinary agencies for transportation cannot be utilized. This mineral wealth is of "vital necessity" to the people of our State. Without the development of the mining industry and of the wealth that it gives to our people, the other arts and industries would necessarily languish. In one sense the mineral industry gives to the State the wealth which enables other industries to be originated, developed and maintained. The legislature is made up of representative men from all over the State. These men, coming from different localities, surrounded by different conditions and circumstances, meet together and delib-

erate as to what is the public good, as to what is the public benefit; in short, as to what are public uses. All these men, from these different localities, and surrounded by the different conditions, deliberate and declare that the development of the mining industry is of "vital necessity" to the State of Utah, and is such as necessitates a legislative declaration that the development of such industry is a public use. No court has such knowledge of the State of Utah, of its conditions and of its circumstances as is possessed by a whole legislature. Therefore, a court should consider thoroughly before it declares that a public use so declared by the legislature is not a public use. These legislators have means of knowing what is a benefit to the State of Utah and to its people such as it is almost impossible for any court to possess. Now if all the above is assumed to be true, together with all the many incidents that can be imagined as logically belonging to the same, then it is the duty of this court to assume that such a state of facts existed as justified the legislature in its declaration that the development of the mining industry is a public use. The true test in this matter is also laid down in 41 Cal. 172, Stockton etc. Co. v. City of Stockton. On this page the court says:

"The true rule to be extracted from the cases, and which is applicable to the case at bar, is that if it is possible that the work or object selected by the legislature for aid concerns the public use, we must consider that it does in fact do so."

The legislative declaration of a public use will be respected by the courts, unless such declaration is clearly without reasonable foundation.

In 160 U. S. 668, U. S. v. Gettysburg Electric Ry. Co., it appears that the United States was seeking to con-

demn certain premises so as to preserve the lines of battle at Gettysburg and the right of eminent domain was authorized for this purpose. It was held in substance that whatever tends to "enhance the respect and love of the citizen for the institutions of his country and to quicken and strengthen his motives to defend them," is a public use. On page 680, it is said:

"* * * that when the legislature has declared the use or purpose to be a public one, its judgment will be respected by the courts, unless the use be palpably without reasonable foundation."

In 169 U. S. 568, Backus v. Fort etc. Co., it is said:

"The question of necessity is not one of a judicial character, but rather one for determination by the law making branch of the government." (Cases cited omitted.)

See to the same effect:

11 Nevada 399-400, Dayton Mining Co. v. Seawell;

10 Ency. Law (2 Ed.) 1070;

64 S. W. 590, and cases cited, Tuttle v. Moore.

It is obvious that the function to decide what is a proper use is rather legislative than judicial because "public use" is practically equivalent to "public benefit," "public policy" and "public good," and these matters are usually left to the legislature to decide, and courts seldom interfere with the legislative decision on these questions.

The case in 164 U. S. 112, Fallbrook Irrigation District *v.* Bradley, deals with public use as applied to irrigation in arid territory. In the syllabus on page 113, it is said:

"What is a public use, for which private property may be taken by due process of law, depends upon the par-

ticular facts and circumstances connected with the particular subject-matter.

"The irrigation of really arid lands is a public purpose, and the water thus used is put to a public use; and the statutes providing for such irrigation are valid exercises of legislative power."

On page 156 of the same case it appears that it was contended in opposition to irrigation being a public use that the use of the water was not public because it was limited to those particular persons who were entitled to use it at certain specified times, so that the benefit to the public was only indirect or collateral. The same objection could be made by plaintiffs in error in the case at bar, and the answer to such objection by the Supreme Court of the United States is just as pertinent in this as it was in that case. On page 158, the court further says:

"The question, what constitutes a public use, has been before the courts of many of the States and their decisions have not been harmonious, the inclination of some of these courts being towards a narrower and more limited definition of such use than those of others."

The court further says on page 159-160:

"It is obvious, however, that what is a public use frequently and largely depends upon the facts and circumstances surrounding the particular subject-matter in regard to which the character of the use is questioned."

The court further says on page 160:

"On the other hand, in a State like California, which confessedly embraces millions of acres of arid lands, an act of the legislature providing for their irrigation might well be regarded as an act devoting the water to a public use, and therefore as a valid exercise of the legislative power."

The court further says on page 161:

"The fact that the use of the water is limited to the

landowner is not therefore a fatal objection to this legislation."

On page 164, the court further says:

"Taking all the facts into consideration, as already touched upon, we have no doubt that the irrigation of really arid lands is a public purpose, and the water thus used is put to a public use."

In Clark *v.* Nash, 198 U. S. 361, decided by this court May 15, 1905, in error from Utah to the Supreme Court of the United States, it is said:

"Where the use is asserted to be public, and the right of the individual to condemn land for the purpose of exercising such use is founded upon or is the result of some peculiar condition of the soil or climate, or other peculiarity of the State, where the right of condemnation is asserted under a State statute, we are always, where it can fairly be done, strongly inclined to hold with the State courts, when they uphold a State statute providing for such condemnation. The validity of such statutes may sometimes depend upon many different facts, the existence of which would make a public use, even by an individual, where, in the absence of such facts, the use would clearly be private. Those facts must be general, notorious and acknowledged in the State, and the State courts may be assumed to be exceptionally familiar with them. They are not the subject of judicial investigation as to their existence, but the local courts know and appreciate them. They understand the situation which led to the demand for the enactment of the statute, and they also appreciate the results upon the growth and prosperity of the State, which in all probability would flow from a denial of its validity. These are matters which might properly be held to have a material bearing upon the question whether the individual use proposed might not in fact be a public one."

"This court has stated that what is a public use may frequently and largely depend upon the facts surrounding the subject, and we have said that the people of a

State, as also its courts, must in the nature of things be more familiar with such facts and with the necessity and occasion for the irrigation of the lands, than can any one be who is a stranger to the soil of the State, and that such knowledge and familiarity must have their due weight with the State courts."

"The rights of a riparian owner in and to the use of the water flowing by his land are not the same in the arid and mountainous States of the West that they are in the States of the East. These rights have been altered by many of the Western States, by their constitutions and laws, because of the totally different circumstances in which their inhabitants are placed, from those that exist in the States of the East, and such alterations have been made for the very purpose of thereby contributing to the growth and prosperity of those States arising from mining and the cultivation of an otherwise valueless soil by means of irrigation. This court must recognize the difference of climate and soil, which render necessary these different laws in the States so situated."

In 1 Col. 551, Yunker v. Nichols, decided in 1872, it is said in the syllabus:

"In this territory lands are held in subordination to the dominant right of others, who must necessarily pass over them to obtain a supply of water to irrigate their own lands.

"A right to convey water over the land of another for the purpose of irrigating one's land may be acquired under the statute (Rev. Stat. 363), and such right needs not a grant from the owner of the servient estate to support it."

Prior to the Utah statute, the State of Nevada passed a law, of which the Utah act is a substantial copy, declaring in substance that the development of the mining industry was of paramount importance, and in substance providing for the exercise of the right

of eminent domain therefor. This statute has been held constitutional in two cases:

11 Nev. 394, Dayton Co. v. Seawell;
15 Nev. 147, Overman etc. Co. v. Corcoran.

The Legislature of Utah adopted the Nevada statute after it had been held constitutional by the Supreme Court of Nevada.

In 15 Nevada 147, Overman etc. Co. v. Corcoran, it appeared that under the Nevada statute it was sought to condemn a certain mining claim for the erection of mining machinery and sinking a shaft, because no other lands could be selected for that purpose except at great and inadequate expense and at places inaccessible to a railroad or to wagon roads; in particular, it was sought to get the vein on its dip, and by going down the hillside a place could be selected where the sinking could be done not only conveniently, but at very much less expense. The opinion of the court was rendered by Justice Hawley, afterwards Federal Judge for the District of Nevada. It was held that the use in question was public and that it was justified by the Nevada statute.

It has been held in Georgia that the construction of an irrigation ditch for the development of mines for the purpose of furnishing more gold for circulation is a public use, and that, too, in a State where little gold is found.

59 Ga. 419, Hand etc. Co. v. Parker.

The Nevada statute has also been held constitutional by the Federal Court for the District of Nevada.

59 Fed. 29, Douglass v. Byrnes.

The doctrine of the Nevada and Georgia cases has been approved in Montana.

16 Mont. 526-8, Butte etc. Co. v. Mont. etc. Co.;
19 Mont. 462 (48 Pac. 757.), Ellinghouse v. Taylor.

In the last case, 48 Pac. 757, the court states that the particular language not only applies to the use of water for the purpose of irrigation, but also applies to "working a particular mine."

So in Arizona, it has been held that a right of way for an irrigation ditch is a public use.

26 Pac. 376, Oury v. Goodwin.

A great number of authorities as to the development of mines being a public use is collated in 10 Ency. Law (2nd Ed.) 1086-7.

There are many States in the Union which would undoubtedly hold that an irrigation ditch is not a public use, and they would be entirely correct in so holding; but our own court, as well as other courts in the arid region, would be just as correct in holding, on principle, to the direct contrary, on account of the difference in the public good. The same has been held in Maryland in regard to a railway for the carrying of supplies and coal from a mine.

37 Md. 538, 559, New Central etc. Co. v. George's etc. Co.

In 87 N. W. (Wis.) 849, 852-3, Chicago etc. Co. v. Morehouse, it was held that a railway company is exercising a public use in condemning land for a spur track to one establishment.

In 77 Pac. Rep. 849 (Utah), Stockdale v. R. G. W.

Ry. Co., it was held substantially to the same effect as in the Wisconsin case.

In 94 N. W. (Iowa) 507, Morrison v. Thistle Coal Co., is practically to the same effect as the case from Wisconsin.

In 48 Iowa 140, Ahern v. Dubuque etc. Co., it was held to be a public use to construct drains and levels for the purpose of draining mineral lands so that they would be available for mining purposes. On principle, there is no difference between the last case and the one at bar.

A public use is not determined simply by the question whether a physical use is made by the public; but the question is deeper and depends upon whether the use subserves the public good or tends to that end.

In 16 Wall. 694, Olcott v. Supervisors, it is held that railroads, even though constructed and owned by private corporations, are public highways and have been so declared by nearly all courts, and yet it is stated in the same connection that this is true, though the road is built by a private corporation. On page 695, the court further says:

"Whether the use of a railroad is a public or a private one depends in no measure upon the question who constructed it or who owns it. It has never been considered a matter of any importance that the road was built by the agency of a private corporation. No matter who is the agent, the function performed is that of the State. Though the ownership is private the use is public."

In 5 Nev. 308, Gibson v. Mason, substantially the same determination is reached.

In substance, if by any possibility the public good is subserved so that there is a public use, then the court will assume that such a state of facts exists as justifies the legilature in its declaration. As is said in the above quotation, a railroad may be owned by a single individual through a corporation. It may be assumed that a railway is constructed for private profit, and yet the railway is a public use, because it performs a public function, and the incidental good resulting therefrom is recognized as beneficial to the public even though all the ulterior intentions may be that the railway shall be private. So that the question is not merely as to whether there is a physical use of the utility by the public, but the question is as to whether the use subserves the public good; because if the use exists by public declaration, then it follows that the public, through its legislature, may regulate and control such public utility for the benefit of the public. It may be that the legislature may not attempt to do this, but that is not the test. If the legislature has such right that is sufficient. In 94 U. S. 113, Munn v. Illinois, the court declared that elevators and store houses for grain are public utilities and may be controlled by the public. In this case, it became necessary to consider what is a public use, and when property is so used that it may be regarded as a public utility and regulated as such. On page 126 of this opinion the court says:

"Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the

extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control."

In 186 U. S. 245, Chesapeake & Potomac Tel. Co. v. Manning, it is said:

"But it is well settled that the courts always presume that the legislature acts advisedly and with full knowedge of the situation. Such knowledge can be acquired in other ways than by the formal investigation of a committee, and courts cannot inquire how the legislature obtained its knowledge. They must accept its action as that of a body having full power to act, and only acting when it has acquired sufficient information to justify its action."

So in the case at bar, when the defendant in error so uses its property that the public has an interest in it, then the use of such utility may be regulated and controlled by the public. What reason is there that the legislature cannot control and regulate tramways just as it can railways, and telephone and telegraph lines?

In 66 L. R. A. 387 (99 Me. 579), Ulmer et al v. Lime Rock Railroad Co., it appeared that the primary purpose was to build a branch track to a stone quarry for the accommodation of the owner, and it was held that this would not prevent the public from making use of the track. In paragraph four of the syllabus it is said:

"The exercise by a railroad company of the power of eminent domain to acquire a right of way for a branch track to a stone quarry is, in effect, a declaration that the branch is subject to the use of the public, and to public control."

From the foregoing cases, it is apparent that the question is not so much whether the public uses the

particular instrumentality as whether the public has a right to use it, and it is held that whenever the legislature declares a certain thing a public use, that it is idle to say that it is private. So in this case, if the legislature should attempt to regulate this tramway, it would have the right to do so, because the tramway exists as a public use by virtue of the statute, and consequently can be regulated as such, even though it may not be regulated in the particular statute declaring the public use. See 16 Wall. 688, 694-5, Ollcott v. Supervisors.

Is there now any doubt about the power of the Utah Legislature to regulate tramways within reasonable limits as to the tolls they may charge, or to regulate the hours for employees, or, in short, to make all kinds of reasonable regulations that it would have the legal right to make as to railways and other public utilities that are recognized everywhere as public uses?

The tramway of defendant in error does not have a locomotive or cars as they are commonly understood, nor is the transportation on the ground; but its tramway is operated in part by steam power. Its buckets answer the purpose of cars, its cables answer the purpose of rails, but the buckets travel through the air instead of on the ground like cars, because it is impracticable to construct or operate a railroad at the particular place in question. The cables and buckets and towers answer all the purposes of a railway and railway cars. Coal and materials are taken to the mines substantially as though a railway were in existence. If a railway had been constructed, there is no question but that it would be a public utility, and even though the railway were used exclusively by the defendant in error, yet the legislature would have the right to regu-

late the railway so that the public could avail itself of its advantages. But the tramway occupies no different position so far as substance is concerned. It is substantially the same as a railway, except that the method and means of transportation are changed so as to conform to the physical conditions of the country. It is clear, according to all the ordinary methods of reasoning, that this particular use is public and just as much so as a railway would be under similar conditions.

The State courts are in irreconcilable conflict as to what are public uses. For instance, this is well illustrated in the "Mills Act;" see 1 Lewis Em. Dom. Sec. 180, et seq., and instances there given. The United States Supreme Court has never passed upon the constitutionality of these Mills Acts.

See 113 U. S. 20-1, Head v. Amoskeag Mfg. Co.

By the majority of the courts and from the reason of the thing, it is apparent that the backing up of a stream of water and the overflowing thereby of a large area of land for the purpose of operating a mill is more than a mere regulation of the water in that stream among the riparian owners. It might be a mere regulation of the water if a statute should provide as to the use of the stream by the different owners and segrate the use; but when a large area of land is flooded and the land is taken for flooding purposes, then it seems to be more than a mere regulation of water; for all practical purposes, it is a taking of the land, and the great majority of courts in the United States, as well as the standard text writers, so hold. In deciding this case, it is necessary to go to the most direct State authorities, and to the nearest analogous cases, keeping particularly in mind the public policy of other States

as compared with the public policy of the State of Utah.

The court will not hold unconstitutional the Utah statute declaring tramways for certain purposes a public use, unless it is clearly, plainly and palpably in conflict with the Federal Constitution. Even if there is a doubt, the law will be declared valid.

In 6 Cranch 128, Fletcher v. Peck, it is in part said:

"The opposition between the constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other."

In 94 U. S. 123, Munn v. Illinois, it is said:

"Every statute is presumed to be constitutional. The courts ought not to declare one to be unconstitutional, unless it is clearly so. If there is doubt, the expressed will of the legislature should be sustained."

In 181 U. S. 285, Fairbanks v. United States, it is said:

"The presumptions are in favor of constitutionality, and before a court is justified in holding that the legislative power has been exercised beyond the limits granted, or in conflict with restrictions imposed by the fundamental law, the excess or conflict should be clear."

The effect of this rule, in passing on the constitutionality of statutes, is apparent. For instance, some statutes might declare that the raising of ~~cats~~ rats was a public use. This would be plainly, clearly and palpably unconstitutional. One the other hand, it is too clear for argument that a railroad is a public use. Between these two extremes, however, courts approach

a dividing line so shadowy that it leaves room for argument as to whether a statute is constitutional. For a distance on each side of the line the decision is plain, but on the line and in its immediate vicinity there is doubt. And whenever the court is in doubt, it holds the statute constitutional. Unless the court is convinced that the statute is plainly, clearly and palpably unconstitutional, it holds it constitutional.

POINT III.

The Defendant in error was organized to acquire, construct, maintain, and operate an aerial tramway for the transportation of ores, material and things generally used in an about the operation of mines, and such tramway is used to facilitate the milling, smelting, and reduction of ores and the working of mines, and the Defendant in error is a carrier for itself and others.

The above statements are found *as facts* by the trial court. (See Findings 1 and 2, Record 17.)

As the defendant in error is organized to acquire, construct, maintain, and operate an aerial tramway for the transportation of ores and mining supplies, and is actually a carrier for itself and others, why, *in fact*, is it not an actual public use and engaged in a public function? To us, it is clear that the uncontroverted facts in this case do not bring it within the Federal constitution nor within the realm of constitutional law. On this one point alone, in our opinion, there should be an affirmance in this case.

POINT IV.

IN THE FOREGOING, WE HAVE, WE THINK, FULLY MET THE ARGUMENTS CONTAINED IN THE BRIEF OF PLAINTIFFS IN ERROR, BUT WE CALL ATTENTION BRIEFLY TO ONE OR TWO MATTERS.

At page 14-17 of their brief, it is argued that the mining claim of the plaintiff in error is already devoted to a public use under the statutes of the State of Utah, and that Subdivision 3, Section 3590, R. S. Utah, 1898, provides that property appropriated to a public use shall not be taken unless for a more necessary public use than that to which it is already appropriated. The inapplicability of this statutory provision seems to us so plain as to require no discussion. The mere fact that the property in question is mining ground and that the right to exercise the power of eminent domain is conferred by the statute for mining purposes does not appropriate each patented claim to the public use. The right to condemn ways across agricultural lands for the construction of irrigating ditches for the purpose of supplying water to other lands is conferred by the same statute, but it would be a manifest absurdity to insist that under such statute all of the arid land in the State was appropriated to the public use. To do so would simply render the statute itself inoperative. The two cases it seems to us are precisely analogous. In addition to this, the particular proposition now under discussion does not involve the validity of the statute nor does it present any constitutional question. It would therefore seem a question addressed wholly to the judgment of the State court over whose determination this court would have no jurisdiction.

Plaintiffs in error cite in their brief several cases to the effect that private property cannot be taken for *private use*. We agree with this statement. It is admitted without qualification that private property must be taken for public use or it cannot be taken at all. So that at last the question simply resolves itself into what is a public use; and it is on this question that the courts divide. Plaintiffs in error cite cases from 18 Cal., 51 Cal., and 53 Cal. In the last case cited, viz: 53 Cal. 694, People v. Pittsburg etc. Co., it was simply decided that the company had imposed upon the court to obtain a franchise, and for that reason its charter was cancelled. All of the California cases cited by the plaintiffs in error may be disposed of in one statement:

The Supreme Court of the United States in 164 U. S. 159, Fallbrook Irrigation District v. Bradley, cites cases from the Supreme Court of California, in 76 Cal., 79 Cal., and 92 Cal. in support of its own conclusion that an irrigation ditch was a public use. All of these California cases cited by the Supreme Court of the United States were decided *after* the California cases cited by plaintiffs in error. If the earlier cases in California relied upon by plaintiffs in error are contrary to the later cases cited by the Supreme Court of the United States from California, then they are overruled. If they are not contrary in principle, then they are not in point; in either event, they would not be authority.

Plaintiffs in error cite two cases from Pennsylvania; one is 79 Pa. 257, Edgewood's R. R. Co.'s App., where it was merely decided that the railway in that case was not constructed as authorized by the lateral railroad laws. In the other case, 84 Pa. 90 Waddell's App., it was held that according to the language of the act authority was given to take private property for private

use. The Utah statute is not so worded. Plaintiffs in error cite four cases from West Virginia in support of their position. They also cite a case from Illinois, viz: 118 Ill. 427. Exactly to the contrary of all these cases is 87 N. W. (Wis.) 849, Chicago etc. Co. v. Morehouse, where a great number of authorities is cited in support of the decision which authorities are contrary to the Illinois and West Virginia cases. Plaintiffs in error cite 96 N. Y. 42; there the legislation was to the effect that no right as to the use or management of the particular utility was conferred upon the public.

Plaintiffs in error cite 18 N. J. Eq. 54. A reading of the facts in this case shows that the use was manifestly not public.

It is respectfully submitted that the decree of the lower court should be affirmed.

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